United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4205

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

JACK LaLANNE MANAGEMENT CORP.,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR JACK LaLANNE MANAGEMENT CORP., RESPONDENT, IN OPPOSITION TO APPLICATION FOR ENFORCEMENT

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ISSUES PRESENTED

While we do agree, as stated by the Board in its brief, that issues exist as to whether there is substantial evidence to support the Board's findings, and as to whether the Board's order is proper, the Court should also be cognizant, from the outset, of other issues presented, as follows: (1) Whether the Board, in finding the discharge of Paulette Anderson to have been unlawful, erroneously relied upon uncorroborated, denied hearsay, erroneously took official notice of a fact based upon a newspaper article dated some 13 months after the events in question, without prior notice to Respondent ("Company") that such notice would be taken, and erroneously relied upon an employer's statement protected by Section 8(c) of the National Labor Relations Act ("Act"), 29 U.S.C., Section 158(c). (2) Whether the Board erroneously based its decision as to the elimination of Anderson's Thursday hours upon its opinion that management's conduct had only "surface plausibility" and was "passing strange." (3) Whether the Board denied the Company due process of law by holding it responsible for the conduct of employee Ellen Brezenoff, who was, admittedly, not a supervisor of the Company. (4) Whether Joan Holland was at the time she allegedly made unlawful statements in January, 1974, a supervisor of the Company within the meaning of Section 2(11) of the Act. (5) Whether, under Section 10(b) of the Act, the Board lacked jurisdiction to allege and find that the Company had discriminated against employee Richard Kaufman in violation of the Act,because his case was not "closely related" to the charge

herein, and whether the amendments to the complaint as to conduct of supervisor Katz and alleged supervisor Holland were prejudicial to the Company, in view of the policies underlying the Section 10(b) six-month limitation period. (6) Whether the Company was denied due process of law by the Administrative Law Judge's ("ALJ") restriction upon the cross-examination of Kaufman.

STATEMENT OF THE CASE

A. The Prior Representation and Unfair Labor Practice Cases

The Company, Jack La Lanne Management Corp., operated, during the material events here in question, some ten health spas in the New York Metropolitan Area (A.5, A.7, A.116, A.546-547).* The locations of these spas were, and are, as follows: Brooklyn (Kings Highway and Flatbush spas), Queens (Douglaston and LeFrak City spas), Long Island (Woodmere spa), New Jersey (Fort Lee spa) and Manhattan (Executive, Madison, 86th Street and Biltmore spas) (A.7, A.546).

Local 966, International Brotherhood of Teamsters ("Local 966"), commenced an organizational campaign at the Douglaston spa in early June, 1973 (A.8). As is reflected in the decision and order of the Board's Regional Director (A.114-123), a representation petition was filed by Local 966 with the Board's Regional office. Local 966 sought an election amongst the employees at the

* "A" followed by a number, refers to cited pages of the printed Appendix. Certain Exhibits are not in the Appendix, but have been lodged with the Court by the Board. These are Respondent's Exhibit No. 9 (payroll sheets for female employees) and Respondent's Exhibit No. 14 (male employee hours summary). Also lodged with the Court are the decision and order of the Board in a prior case (Case Nos. 29-CA-3437, 3468, and 3538).

Company's Douglaston (also called Little Neck, A.546), Woodmere and 86th Street spas. Local 10, International Brotherhood of Production, Maintenance and Operating Employees ("Local 10"), also filed a petition for an election. It sought to represent employees at only the Kings Highway spa (A.115).

These "representation" petitions were consolidated for purposes of a hearing on July 18, 1973 (A.114). At the hearing the Company contended, inter alia, that the only appropriate bargaining unit would encompass all ten of its spas (A.116). This contention was upheld by the Board's Regional Director. He observed, inter alia, in support of his holding, that "some of the instructors work at more than one spa either on a regular basis or as substitutes for absent personnel," and that employees are trained at a spa determined by the service supervisor without regard to the location to which they will be assigned (A.118). The Regional Director further found that "transfers between locations are effected as needed" (A.119).

An election was directed in all ten of the Company's then existing spas (A.121-123). The petition of Local 10 was dismissed, because that union had stated it sought to participate in an election only if the Kings Highway spa were found to be a separate appropriate bargaining unit (A.121). Only the name of Local 966 was to appear on the ballot (A.121-123). The election was held on December 12 and 13, 1973 (A.9). Local 966 lost the election (A.9). No objections to the results of that election were filed by Local 966 (A.875).

At various dates in June, July, and September, 1973, three separate unfair labor practice charges were filed, respectively, against the Company, by Local 966, by Local 10, and by an individual who had worked at the 86th Street spa named Wayne Horodowich. The outcome of those charges is reflected in the decision and order made in those consolidated cases by Administrative Law Judge Almira A. Stevenson, dated April 25,1974, and adopted, pro forma, by the Board, in the absence of exceptions, on June 3, 1974 (A.59 - see decision lodged with the Court).

Judge Stevenson dismissed a large part of the complaint allegations in that proceeding. In particular, we note that she dismissed the allegation that Wayne Horodowich had been discharged because of his union activity. (See pages 21-24 of ALJ Stevenson's decision). The Anderson discharge, a principal issue on this appeal, is therefore the only discharge found by the Board to have been unlawful since the commencement of the Local 966 campaign in June, 1973. We note that at least 105 employees are in the bargaining unit (A.223).

Judge Stevenson also dismissed an 8(1) allegation that the Company had decided to transfer employee Kaufman from the Douglaston spa to another spa because of his union activity. She found that the contemplated transfer was lawful, and specifically stated "the overwhelming weight of the evidence establishes that such transfers are a common practice in the Respondent's operations." (See pages 4-6 of ALJ Stevenson's decision).

Several other 8(1)'s were also dismissed by Judge Stevenson. Judge Stevenson did, however, find a few incidents of 8(1) conduct (e.g., "threats"and "interrogation"). The several violations found all occurred in June, 1973.

The Company did not file exceptions to these findings (due, we would add, solely to the inordinate expense of such an appeal in proportion to the limited nature of the Board's order - A.156, counsel's representation at the hearing). While we are now technically bound thereby, we believe the Court, on this appeal,ought properly to note something of the extremely limited (and questionable) nature of the findings, and the limited time period involved, rather than refer in general, prejudicial terms to a "bitter" "campaign" of unfair labor practices, as the Board chooses to do (see pages 15 and 25 of the Board's brief). It is ludicrous to characterize the prior case as "Jack La Lanne I," as the Board does, as if to connote some resemblance to the J.P. Stevens line of cases and the like (Board's brief, p.5,p.31). Subsequent to June, 1973, through the election, there is not a trace of unlawful conduct, save for an alleged remark Katz made to Brezenoff just about the time of the election (A.525-526).

We note, with respect to the prior decision, that the only violation found at any spa, other than Douglaston, was at Kings Highway in June, 1973. That finding is reflected in a single isolated incident where a supervisor allegedly implied that an employee would be docked for lateness if the Company were unionized.

We represent herein, as we did at trial (A.156), that the Company complied with the order in that case by posting the required notice at the Douglaston and Kings Highway spas.

B. The Case Presently Before the Court

Paulette Anderson, Richard Kaufman and Debra Caron were part-time employees at the Company's Douglaston spa. Kaufman, found by the ALJ to be the "spearhead" of the Local 966 campaign (A.8), testified at the prior representation and unfair labor practice hearings in July and November, 1973, respectively, and acted as one of the Local 966 observers at the election (A.411, A.418-419). Both Anderson and Caron were Local 966 card signers, testified at the November 5 unfair labor practice hearing, and were observers at the election (A.166-167, A.317 - Caron was only an observer on December 12, A.317). Other employees also signed union cards, acted as observers, and testified during the prior hearings (A.214-215, A.227-228, A.342-343, A.419, A.443, A.874, and see the prior representation and unfair labor practice decisions). No discrimination has been charged as to any of them (e.g., Cash, Isgro, Rigney, Grasso, Averitt, Still, and Antone).

The instant proceeding commenced on March 25, 1974 (over three months after the December 12 and 13, 1973 election), when Paulette Anderson, who was a part-time instructress at the Douglaston spa, filed a single unfair labor practice charge. That charge constitutes the entire foundation for the protracted unfair labor practice proceeding now before this Court. The text of that charge,

which alleges violations of Sections 8 (a) (1) (3) and (4) of the Act, reads, in toto, as follows:

> "Since on or about March 22, 1974, the above named Employer, by its officers, agents and representatives threatened to terminate Paulette Anderson, an instructress, insisted she transfer to another location, and since about December 15, 1973, reduced her number of hours of employment because she was engaged in activities on behalf of Local 966, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a labor organization, and because she gave testimony under the Act in the matter of Jack LaLanne Management Corp., Case No. 29-CA-3437." (A.64).

The charge also contains the standard "above and other acts" clause.

Richard Kaufman never filed any charge (A.821). Nor did Local 966 file any charge, save for that already referred to in the summer of 1973. Nor did it file objections to the election (A.875). Nor, insofar as the record shows, or insofar as we are aware, did any other employee at the Douglaston spa file any charge against the Company. Nonetheless, the complaint alleged violations far beyond Anderson's charges as to her discharge and reduction in her hours.

The complaint herein, dated May 24, 1974 and as refined by the bill of particulars, alleged each of the following to constitute violations of Sections 8(a) (1) (3) and (4) of the Act (A.66-71, A.85-89): (1) The discharge of part-timer Anderson on March 25, 1974; (2) The elimination of Anderson's Thursday hours in January, 1974; (3) The alleged assignment to Anderson and Caron of more cleaning, more members to instruct and additional calis-

thenics classes for the period from December 16, 1973 through December 31, 1973; (4) The reduction of Caron's hours by one on Monday and Wednesday nights, respectively, in February, 1974; (5) The elimination of Kaufman's calisthenics classes in January, 1974: (6) Reductions of Kaufman's hours in October, 1973 and January and February, 1974.

The complaint was orally amended at the hearing, over objection, to also allege, inter alia, that in January, 1974, one Joan Holland was a supervisor of the Company and had unlawfully warned and directed employees Balalaos and Murphy not to associate with Anderson and Caron (A.179-182), and to allege that supervisor Anita Katz (her supervisory status is conceded) had engaged in like conduct towards employee Brezenoff, and, also, had given Caron a warning for a rule infraction that Katz knew had not, in fact, occurred (A.158-162).

The Company duly denied each of the allegations of the complaint, as amended (A.76), and asserted the affirmative defense that the allegations of the complaint pertaining to Kaufman, and the amendments thereto with respect to the supervisory status and conduct of Holland, and with respect to Katz's conduct, were barred by Section 10(b) of the Act (A.181-182).

The Administrative Law Judge found, for the most part, against the Company, except that he dismissed the allegation that Caron's hours had been unlawfully reduced. (A.45-46,A.25). The ALJ's recommended order provided cease and desist language

which would apply to any future violation, of any kind, at any of the Company's spas, along with posting of notices at its offices and each spa. He further ordered that Paulette Anderson be offered reinstatement, and that she and Kaufman be made whole for any monetary losses suffered by reason of the Company's alleged unlawful discrimination (A.46-49).

The Company filed exceptions to virtually all of the ALJ's adverse findings and conclusions and to his recommended order. The Board, by Members Jenkins, Penello and Kennedy (who concurred in the result) adopted, with some amplification, the ALJ's decision and order, except it modified his conclusions, in one respect, by finding that the four-and one-half hour reduction in Kaufman's hours in October, 1973, was lawful (A.52-58).

C. The Nature of the Company's Operations: Frequency of Transfers Between Spas and Hours Changes.

As already set forth, the Company operated some ten health spas during the events in question. Harry Schwartz is president of the Company (A.797). His wife is Gabrielle Schwartz. At the time in question she was a service supervisor for the gyms, in charge of female employees (A.797 , A.687). Anita Katz was assistant service supervisor for female employees (A.545). Mrs. Schwartz and Katz were in charge, inter alia, of transfers of employees amongst the spas (A.687, A.695-696, A.577-578, A.581-582, A.550).

Company witness Gabrielle Schwartz testified that transfers are a "very normal kind of a thing, every day, every week, every week, every month" (A.693). Katz corroborated Schwartz, and

noted that transfers can last from a day to a few weeks (A.579-580). Katz explained that effectuating transfers was a normal part of her duties (A.579). Both Schwartz and Katz enumerated numerous examples of transfers of full-time and part-time employees amongst all the spas (A.577-580 A.693-696). No effort at all was made by General Counsel to impugn this testimony on cross-examination, or to present evidence to controvert it.

Another working condition common to the operations in all of the Company's spas is changes in the hours of its part-time employees. Documentary evidence bears this out (Resp.Ex. No.14). Harry Schwartz testified that "hours are changed very frequently throughout the entire organization" (A.819). Mrs. Schwartz confirmed this (A.696-697). So did area supervisor Bostinto (A.786). Bostinto enumerated specific examples of hours reductions for part-timers, at other spas, of from 4 to 14 hours (A.786). And the Board found, in its decision in this case, that the reduction of Kaufman's hours by 4 1/2 in October, 1973, was lawful, as was the reduction of Caron's hours by two in February, 1974 (A.55-56, A.23-24). The Board also expressly found lawful a reduction of the hours of one of the Douglaston spas's part-time employees, Phil Matinale, from 22 to 8 1/2, as of January and February, 1974 (A.56, footnote 5, A.32, footnote 2). In fact the Board found that, "It is undisputed that hours of part-time instructors were changed with some frequency in response to changes in the need for their services" (A.55).

There is no clear formula for determining hours changes (A.785-786). Bostinto testified, as to how hours are determined, as follows: "We use observation, we use statistics, we use amount of workouts, the amount of business in the gym. There are many things to determine how many instructors are needed." * * * "Everything depends upon the situation, depends upon the time" (A.786).

We shall not set forth a detailed narrative of the entire lengthy factual background presented. While, if space permitted, we would prefer such a narrative, with due reference to both sides of the issues, we believe that our brief statement of the issues and the case, supra, together with the Board's decision, the Board's brief, and the factual references contained in our argument, suffice to generally present the case. [See F.R.A.P., Rule 28(b)]. We, of course, take extensive issue with the Board's fact findings, as not being in accordance with the substantial evidence principle. Our position with respect thereto is incorporated in the argument that follows.

ARGUMENT

POINT I - PAULETTE ANDERSON WAS LAWFULLY DISCHARGED ON MARCH 25, 1974, FOR REFUSING TO ACCEPT A TEMPORARY TRANSFER TO THE COMPANY'S MADISON SPA

We first allude, briefly, to the applicable principles of law as they pertain to Anderson's discharge. The burden of proof is, at all times, upon the Board's General Counsel to establish, by acceptable substantial evidence on the whole record, that discharge came from the forbidden motives. N.L.R.B. v. T.A. McGahey, Sr., d/b/a Columbus Marble Works, 233 F. 2d 406, 412-413 (C.A. 5,1956),

cited with approval by the Board in Borin Packing Company, Inc., 208 NLRB No. 45. It is a burden that never shifts. N.L.R.B. v. Winter Garden Citrus Products Corp., 260 F. 2d 913, 916 (C.A. 5, 1958), also cited in Borin, supra.

An employer may discharge an employee for a good reason, a bad reason, or for no reason at all. N.L.R.B. v. Ogle Protection Service, Inc., 375 F. 2d 497 (C.A. 6, 1967). Further, the Board may not make a "180° turn" and infer, from its displeasure with the employer's asserted reason, or lack of reason, an unlawful motive, and such motive is not lightly to be inferred. N.L.R.B. v. McGahey, supra. Moreover, union activity does not serve to immunize an employee from discharge. N.L.R.B. v. Lowell Sun Publishing Co., 320 F. 2d 835, 841 (C.A. 1, 1963); N.L.R.B. v. Ogle Protection Service, supra. Nor does the fact that an employer may desire, and even welcome, the opportunity to rid itself of a union adherent, serve to immunize an employee from discharge. N.L.R.B. v. Birmingham Publishing Co., 262 F. 2d 2, 7-9 (C.A. 5, 1959); Golden Nuggett, Inc., 215 NLRB No. 20; M.R. & R. Trucking Co., 218 NLRB No. 169.

A fair analysis in this case, with respect to Anderson's discharge, which occurred on March 25, 1974, some 3 1/2 months after the election, must start with a recognition of the importance and commonplace nature of temporary transfers in the Company's operation of its spas. Transfer constitutes a normal condition of employment. We state this need for recognition of the transfer policy because, while from the very inception of the case before

the Board, the Company has contended that the sole reason for Anderson's discharge was her refusal to accept a temporary transfer from the Douglaston to the Madison spa, neither the ALJ, nor the Board, took the slightest notice of this transfer policy (A. 3-58). (Ironically, the Board, in its brief to this Court, finally takes cognizance of the Company's transfer policy; not, however, in reference to Anderson, but to show support for its broad order - See page 31 of Board's brief). However, it is, of course, fundamental, that this Court, in assessing the substantiality of the evidence, must take into account not simply the evidence the Board relied upon in support of its 8(a)(3) and (4) findings as to Anderson's discharge, but also that which fairly detracts from such evidence, namely, the massive evidence as to the common nature of transfers in the Company's operations. N.L.R.B. v. Universal Camera Corporation, 340 U.S. 474, 71 S.Ct. 456, 95 L. Ed. 456.

The right of an employer to transfer its employees as efficiency demands is a "fundamental" "inherent" and "historical" right, and a right not to be lightly overcome, lest "[o]nce an employee became an active supporter of a union he would remain virtually immune from the directions of his employer." Macy's Missouri - Kansas Division v. N.L.R.B., 389 F. 2d 835, 839, 841 (C.A. 8, 1968). It is this fundamental management right which sets the stage for the Anderson discharge.

We emphasize that transfers are common, everyday occurrences in the Company's operation. (See our statement of the case, supra). The Board's General Counsel virtually conceded this at the outset

of the argument in his brief (page 57) to the ALJ (that same brief, with a supplement, was submitted to the Board):

> "The General Counsel has not alleged in the complaint or urged at the hearing that the Respondent does not have a history of transferring employees among its various locations or that there was no need to transfer an employee in February, 1974 to its Woodmere spa or that there was no need to transfer an employee in March 1974 to its Madison spa. Rather, it has been General Counsel's position that but for Anderson's activities on behalf of the Union she would not have been discharged for refusing to transfer to Madison."

Even the decision of the New York State Department of Labor, Unemployment Division, which denied Anderson's claim for unemployment insurance, and which the Board and ALJ took no note of, stated, in part, that, "at the time of hire you [Anderson] were advised of the possibility of transfer" (A.132) (Both the Board and the Courts have held the decision of a state unemployment agency relevant to an 8(a)(3) issue. Pennco, Inc., 212 NLRB No. 101; Salinas Valley Broadcasting Corporation v. N.L.R.B., 334 F.2d 604, 612 (C.A.9, 1964)).

The discharge of Anderson on March 25, 1974 for her refusal to transfer temporarily to the Madison spa, comes, therefore, in the context of transfers between spas being a normal condition of the employment relationship. (The compelling reasons for a transfer to the Madison spa were explained by Katz, A.581-582, A.585). The sole challenge here is not to the Company's attempt to transfer Anderson, but to its decision to penalize Anderson, by discharging her, for refusing a concededly legitimate temporary transfer to the Madison spa.

The Board, and the ALJ, found that Anderson would not, upon her refusal to transfer, have been discharged, save for her union activity and testimony, because Anderson, in being discharged supposedly received disparate treatment when compared to the treatment accorded employee Rolinda Antone. The Board's disparate treatment theory is, in toto, as follows: Anderson allegedly refused to accept a temporary transfer from the Douglaston to the Madison spa because of her alleged fear of the subways. Antone supposedly refused to remain at the Lefrak spa, after she had been transferred there, because she allegedly did not like the parking arrangements (A.53). While the Company refused to accept Anderson's excuse for refusing the transfer, it accepted Antone's excuse, and returned her to Douglaston, so the Board says, solely because she had not taken a liking to the parking arrangements at Lefrak. From this single comparison (completely erroneous, as we shall show) the Board concludes that Anderson was treated disparately and that this is strong evidence that her discharge was unlawfully motivated (A.53).

Not only, as a matter of law, is there no evidence of this disparate treatment theory, but, to the contrary, the evidence shows that Antone was treated in a like manner to Anderson. The entire credited testimony, as to the Antone incident, can be found at Antone's testimony at A.388-389. The Board totally ignores the first portion of this testimony, which is as follows: Sometime in March, 1974, Katz called Antone and asked her to transfer to Lefrak City on a temporary basis. Antone refused due

to transportation problems. About a week later Katz called Antone again, and as Antone testified:

> "... [Katz] called me about a week later and she was you know, insistent. She said she really needed someone in Lefrak and I agreed to go there on a temporary basis." (A.388-389) [Emphasis supplied]

We observe that in her charge filed with the Board on March 25, 1974, Anderson alleged that the Company had, to use Anderson's own words, "insisted she transfer to another location ..." (A.64)

What we have, then, is not disparate treatment at all vis-a-vis Antone, but like treatment - an insistence by Katz that both Anderson and Antone, despite their reasons for refusing, transfer temporarily. The only disparity turns out to be that while Anderson refused, absolutely, on two occasions, a transfer to Madison, Antone, when pressed a second time to transfer to Lefrak, agreed, despite her transportation problem, to accept the temporary transfer. Had Antone refused Katz's "insistence" that she transfer, she too might have been the victim of a discharge ultimatum. Indeed, John Wilton, the Douglaston manager, testified that if he was directed to transfer and did not he would expect to be terminated, and that this was Company policy (A.726-727).* And we note that the Company is not at all averse to giving discharge ultimatums. For example, Jackie Balalaos, an instructress, was given an "ultimatum" to change to receptionist or be terminated (A.375-376).

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* Wilton himself was transferred from the Little Neck (Douglaston) to the Executive Club spa and then to the Madison spa. (A.710-711; A.727).

The Board, however, eschews the foregoing portion of A.388-389, which supports our contention of like treatment of Antone, and myopically seizes upon the following testimony, as to what occurred after Antone's transfer to Lefrak, as proof of disparate treatment (A.389):

"Q. What happened? Did you go to work there?

A. I only worked there a week. I really didn't like the work at Lefrak City because I didn't like the parking arrangements. I didn't like where I had to leave my car.

Q. Did you speak to Anita [Katz] about that?

A. Yes.

Q. What did you tell her?

A. She called me because she was switching hours and she called me and I told her I couldn't work there any more and she said it was okay but she needed me to work on Sundays.

Q. Well, after you worked at Lefrak for the one week where did you go to work?

A. I went back to Douglaston.

Q. Thereafter were your days of work in any way changed?

A. I started working on Sundays then also. Sundays from 1 to 5 and Monday and Wednesday from 6 to 10.

Q. Monday and Wednesday were your hours?

A. Those were my original hours, yes."

This testimony is no evidence at all of disparate treatment. It simply does not show what the Board says it does, i.e., that the Company transferred Antone back to Douglaston because she

did not like the parking arrangements. Antone did not call Katz to complain and get back to Douglaston. Rather, Katz called her because she (Katz) was switching hours and needed Antone to work on Sundays at Douglaston. That is why she went back to Douglaston, and, in fact, Antone admits she did start workings Sundays. (Actually, when asked what she actually said to Katz, Antone made no specific reference to parking, but just to the fact that she could not work there any more).

But even assuming, solely arguendo, that Antone was permitted to go back to Douglaston solely because she did not like the parking arrangements at Lefrak, this single, isolated fact would not suffice to establish disparate treatment with respect to Anderson. The Board cannot simply ignore that fact that Katz had, in the first place, "insisted" Antone go to Lefrak, despite Antone's objection to the transfer, and in this respect she was treated like Anderson, as already discussed. This fact serves, at the very least, to nullify any inference of disparity from the fact that she was permitted to return to Douglaston at her alleged request. The Board's extreme emphasis on a portion of Antone's testimony, and its disregard of the fact that she initially transferred to Lefrak only at Katz's insistence, demonstrates an exaggeration of a selected portion of the record, and not an evaluation of the record as a whole. N.L.R.B. v. Danielson Construction Company, 281 F.2d 875, 879 (C.A. 4, 1960); Bon-R Reproductions, Inc. v. N.L.R.B., 309 F.2d 898, 907 (C.A.2,1962).

In any event, that single incident of Antone transferring back to Douglaston, if found, somehow, to be as clear as the Board held, simply cannot suffice to show disparate treatment. Some kind of clear pattern of treatment, in contrast to that accorded to Anderson, must have been shown, and in that respect the burden of proof was on the General Counsel. He failed to present such proof. Cf., Mason & Hanger - Silas Mason Co. v. N.L.R.B., 405 F. 2d 1, at 6 (C.A. 5, 1968); The Seng Co., 210 NLRB No. 129; N.L.R.B. v. Neuhoff Bros. Packers, Inc., 398 F. 2d 640, 645 (C.A. 5, 1968).

We contend, therefore, that the Board has not sustained its disparate treatment theory by anything even approaching substantial evidence.* The Company's reason for discharging Anderson remains totally intact, particularly since her discharge occurred at the time of, and in connection with, her refusal to obey the directive that she temporarily transfer. N.L.R.B. v. Kopman - Woracek Shoe Mfg. Co., 158 F. 2d 103, 108 (C.A. 8, 1946) cited

* We contend that the fact that the Company did not compel Caron, a known union supporter, and an alleged discriminatee in this case, to transfer to Madison on penalty of discharge, despite her refusal to go there, supports our argument that the Company did not treat Anderson disparately, and that it was not seeking to rid itself of Anderson because of her union activity, else it would have discharged Caron as well as Anderson. The Board, however, erroneously regarded this as not probative (A.54). It also, apparently, regarded the failure to compel Antone, who was not a known union supporter, to transfer to Madison as not probative of an unlawful motive (A.54). In this respect, we agree with the Board's conclusion, particularly because Antone had transferred to Lefrak the week before at Katz's "insistence." Viewing, in the light most favorable to the Board, the inferences which might be drawn, as to the motive for Anderson's discharge, from the treatment of Caron and Antone, such inferences serve, at best, to negate each other.

favorably by the Board in F. W. Woolworth Co., 204 NLRB 396, also citing C. G. Conn Ltd. v. N.L.R.B., 108 F. 2d 390, 397 (C.A. 7, 1939).

The Board appears to hold, however, that aside from any disparate treatment, the Company's failure to accept Anderson's alleged reason for refusing to transfer, i.e. her alleged fear of riding the subways at night, and its discharge of her for that refusal, is itself probative of an unlawful motivation (A. 53-54). Such a theory, implied, though not explicit, in the Board's decision (A.53-A.54) is erroneous and has been rejected by the Board itself. In F.W. Woolworth Co., supra, 204 NLRB 396, an employee refused to work overtime, at night, because her babysitter would be leaving and she had to get home. The Board held the discharge was for cause, and found no violation. The Board appears to suggest that it was not very considerate of the Company not to accept Anderson's refusal, particularly as she had been a good employee. However, an employer may show itself to be "callous", "draconian , or even malevolent, but this alone cannot be alchemized into anti-union animus." N.L.R.B. v. Whitfield Pickle Company, 374 F. 2d 576, 580, 582 (C.A. 5, 1967). Our refusal to accept Anderson's reason for refusing the transfer is simply irrelevant.

Assuming, however, solely arguendo, that an employer's refusal to accept an alleged good reason given by an employee as a basis for refusing a work assignment may be considered as evidence of unlawful motivation, there is not substantial evidence

on the record as a whole, to show that Anderson's asserted fear of the subway was the predominant reason given Katz for her refusal. To the contrary, the totality of the evidence shows that Anderson adamantly and absolutely refused a transfer because she felt it was unfair that she was being asked to go to Madison.

Anderson claims she gave, as a reason for her absolute refusal to transfer, her fear of the subways. At the same time, Anderson admits she told Katz a fair way to effect transfers would be to have the employees "take turns", as she had transferred to Woodmere in February (A.199). Her suggestion that employees "take turns", inclusive, we presume, of herself, is inconsistent with her claim that, under no circumstances, would she travel the subways, and this tends to deflate the sincerity of her refusal to transfer for fear of the subw[illegible]. Also revealing of the minor part Anderson's allusion to the subways played in her refusal to transfer is the fact that she failed to put in her pre-trial affidavit any mention of her cousin having been assaulted (A.267).* How significant could that have been if she omitted it from her affidavit? This tends to support Katz's

*The Board erroneously stated that Anderson's cousin was allegedly assaulted in the same "neighborhood" where she would have to travel through at night (A.53). Anderson never stated that. She said only that her cousin was assaulted in the "Bronx". (A.201). The "Bronx", we believe, is something larger than a neighborhood.

testimony that Anderson referred to a "problem" her cousin had in the subway as nothing more than as aside in their conversation (A.587).

Anderson alleges she told Katz that Caron and Antone had both told her that they had refused to transfer to Madison because they were afraid to travel the subways (A.202). But, in fact, they had told Katz no such thing. Antone told Katz she could not go because of babysitter problems (A.28,A.388). Caron told Katz she could not go because it would not be worth it to her monetarily, considering the travel time would be greater (A.28. A.338). Neither Antone nor Caron stated the subways as an objection to working at Madison.

The decision of the New York State Department of Labor, Unemployment Division, which denied Anderson's claim for unemployment benefits, also stands as evidence in contradiction of Anderson's claim that her fear of the subways was the principal basis for her refusal to go to Madison. That decision, which makes no mention of Anderson, the claimant, asserting her fear of the subways, reads as follows:

> " ... you quit your job without good cause."
>
> * * *
>
> "You left because you were being transferred. At the time of hire you were advised of the possibility of transfer. Travel time to the new location is not excessive" (A.132).

Anderson was never called to testify as to her position before the Unemployment Division. She proferred no explanation, or refutation, of this decision's omission of any reference to her

refusal to transfer because of an alleged fear of the subways. The inference which should be drawn is that Anderson did not mention her alleged fear of the subways when applying for unemployment benefits. Cf., N.L.R.B. v. A.P.W. Products Co., 316 F.2d899, 903 (C.A. 2, 1963); N.L.R.B. v. Ford Radio & Mica Corporation, 258 F. 2d 457, 463 (C.A. 2, 1958).

The import of all the foregoing is that Anderson's alleged fear of the subways was not the predominant reason for her refusal to transfer. Rather, as she revealed during cross-examination, there was "no way" the Company was going to get her to transfer to Madison, and she told Katz "absolutely not" (A.264). It is this attitude that Anderson conveyed to Katz. (See Katz's testimony, A.583, A.587).

Even if, however, Anderson's testimony that she expressed, as the predominant reason for her refusal, her fear of the subways, is fully accepted at face value, as the Board accepted it, Katz could not have viewed Anderson's refusal as a bona fide excuse. Four of the gyms under Katz's jurisdiction were located in Manhattan, including the Madison spa (A.546). Katz testified, without challenge or refutation, that the female instructresses employed at these gyms travel from the spas by subway, at 9:00 P.M. or 10:00 P.M. at night (A.588-589; and see Caron's corroborating testimony at A.357). So Anderson's refusal to use the subways, particularly for a temporary period of time, could hardly be given much credence by Katz. Moreover, as already noted, Katz knew Anderson's statement to her that other employees had refused the

the transfer for fear of the subways was incorrect (A. 28, A.338), and Anderson had suggested the employees take turns transferring, a suggestion which conveyed to Katz Anderson's view as to the unfairness of the situation (A.199) and not a fear of the subways.

The Board, however, dismisses our argument that Katz did not view Anderson's reason for refusal as bona fide because Anderson had done some modeling for the Company's advertisements and was described in our brief to the Board as a pretty young instructress, and,based upon an article in the Washington Post of April 20, 1975, a date almost thirteen months after the events in question, it takes notice of a "climate of opinion" in New York City regarding safety on the subways at night. The Board does not expressly state what that climate of opinion is (A.53-54).

As to Anderson's having modeled, and being pretty, Mrs. Schwartz's testimony shows that many of its employees model for it (A.707, A.706). The fact is that the Company's instructresses are generally attractive. In our brief below, referred to by the Board, our reference was not to Anderson individually as a pretty young instructress, but to all the Douglaston female employees who were friends of Anderson. Our point in all this, ignored by the Board, was, and is to demonstrate that Katz, who supervises some ten gyms, has attractive female instructresses in all its gyms, many of whom ride the subways, as Katz testified. Katz, therefore would not be one to consider feminine attractiveness a valid reason not to take the subways (See A. 631).

With respect to the Board's taking official notice of the "climate of opinion" based solely upon the referred to newspaper article, this violated the Administrative Procedure Act ("APA"). The APA, at 5 U.S.C. 556 (e) provides, in part, that, when an agency decision rests on official notice of a "material" fact not appearing in the evidence of record, a party is entitled, upon timely request, to an opportunity to show to the contrary. That opportunity must come before, and not after, the case has been submitted for decision. The failure to provide such opportunity constitutes a denial of due process. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed 1093: Glendenning v. Ribicoff, 213 F. Supp. 301: Sosna v. Celebrezee, 234 F. Supp. 289; Dayco Corporation v. F.T.C., 362 F.2d 180 (C.A. 6, 1966). No such opportunity to contest the "climate of opinion" supposedly reflected by the cited newspaper article was provided here (a "climate of opinion" the Board obviously regarded as "material"- A.53-54).

The procedural error of the Board's official notice is particularly aggravated because the question as to the "climate of opinion" in the subways was tangentially broached at one point in the hearing by General Counsel (A.310, 311). Counsel for the Company stated it appeared the parties would have to litigate the questions of neighborhood areas and subway statistics (A.311). But General Counsel made no effort to present evidence on the "climate of opinion" issue. The Board, however, on its own initiative,

improperly sought to fill what it apparently regarded as a gap in the evidence.

Aside from the procedural error, the article noticed is not proof of the "climate of opinion". It is essentially an editorial, from a non-New York newspaper, dated 13 months after the events here in question, written by an author who is not, apparently, a New Yorker. Our reading of the article reveals no "climate of opinion" adverse to riding the subways, except to the extent that life in the cities in general involves certain adversity (e.g. noise, crime, etc.), and in that respect the article quotes one "official" as stating "you're safer in the subways than you are in the city." In any event, even if there existed, as of March, 1974, some climate of opinion adverse to riding the New York City subways in the evening, that would not be probative of how Katz viewed Anderson's refusal. Katz would not have concurred in any such climate of opinion, since the other instructresses who worked for her in the Manhattan spas regularly rode the subways at 9 and 10 P.M. (A.588-589, A.357).

The Board appears to suggest, however, aside from its erroneous predication of a violation upon disparate treatment, and the Company's failure to accept Anderson's excuse not to transfer, that, even if the Company had a valid reason to discharge Anderson, other evidence of record demonstrates the asserted reason is pretextual. Absent some basis, however, to defeat the Company's reason for discharge, we fail to see how the other evidence really comes

into play. Indeed we believe that this is why the Board made such a strained effort to first emphasize, however unsuccessfully, the disparate treatment theory (A.54). Nonetheless, we now turn to the conventional Board theory of other unfair labor practices supplying the unlawful motive for a discharge. We assume, arguendo, that the other unfairs found are all sustained.

We emphasize, in demonstrating the complete lack of any unlawful motivation as of March 25, 1974, the date of Anderson's discharge, the following: (1) The alleged unfair labor practices directed toward Anderson occurred over two months prior to her discharge. Subsequent to mid-January, 1974, there is no claim that any other unlawful discrimination, unlawful statements or harassment were directed toward Anderson. Thus, in this case, "timing" strongly favors the Company. Compare and contrast to, N.L.R.B. v. Advanced Business Forms Corp. 474 F.2d. 457, 465 (C.A. 2, 1973). (2) As of the time Anderson was terminated, the Company had acted quite amicably toward Anderson, and she had in fact acknowledged this. This is demonstrated by Anderson's own testimony that, after she had, in early February, transferred temporarily to the Woodmere spa, and had worked there for one day (a Wednesday night), Gabrielle Schwartz spoke to her on Friday, and told her that the Company would pay her $15.00 to cover her expenses in traveling to Woodmere (A.191-193). A $15.00 check, dated February 11, 1974, was issued to Anderson, signed by Harry Schwartz, president of the Company (A.134). The ALJ's decision erroneously makes it appear that

Anderson, when told she would receive the $15.00, had not yet worked at Woodmere (A.26).

The significance of this, which the Board and the ALJ hardly note, is that here is a Company alleged to be seeking to harass and rid itself of union adherent Anderson. It has the perfect opportunity to harass Anderson by legitimately transferring her to Woodmere (no one challenges the Woodmere transfer) where it will cost her more for gasoline and related travel costs. Instead, it goes ahead and pays her for gas. It voluntarily subsidizes her travel. The Company's conduct in February, regardless of what it is alleged to have been in December, was thus the antithesis of discriminatory. It was one of friendliness and amicability toward Anderson.

Anderson herself admitted that her conversation with Gabrielle Schwartz, where she was promised gas money, ended on an amicable note (A.261). In fact, the Company's kindness towards her was so great, that she was prompted to write a letter to Mrs. Schwartz, in which she stated, "I wish to express my appreciation for the additional fifteen dollars given to me as reimbursement for gas expenses to Woodmere ... I enjoyed the opportunity of working in another club, and I was glad to have been able to help you" (A.98). Anderson would surely not have written such a letter had Mrs. Schwartz not acted kindly toward her (A.288).

(3) In February, 1974, Anderson received a raise from $3.25 to $3.50 per hour (A.239, Resp. Ex. No. 9). This is hardly

the act of an employer seeking to harass and rid itself of a union adherent. This fact further emphasizes that, regardless of the alleged unfairs of December and January, as of February the Company bore not the slightest ill will toward Anderson.

In view of the above three factors, it is our contention that, even if, arguendo, the few unfairs of December and January, including Holland's alleged remarks that the Company sought to rid itself of Anderson (and Caron) would otherwise serve as some evidence to support an inference of unlawful motivation at that time, the events of February affirmatively serve to dissipate the drawing of such inference down to the date of Anderson's discharge some two months later.

The Board cites several factors to show that, nonetheless, the evidence does support an inference of unlawful motivation as of March 25, 1974. It first points to credited testimony that Harry Schwartz had told Kaufman he and Mrs. Schwartz were "disappointed" when he and Anderson had testified in the earlier unfair labor practice case (A.54). Reference to this "disappointment" statement as evidence of an unlawful motivation toward Anderson is error. Section 8(c) of the Act, 29 U.S.C. Sec.158(c), expressly forbids the Board from considering expressions of views or opinions as evidence of a violation unless such expressions contain a threat of reprisal or promise of benefit. Schwartz's statement contained neither a threat nor a promise. Schwartz's remarks were part of a general conversation, no part of which is alleged to be a violation. His

disappointment remark was an "utterance without animus, it was not made as part of a threat, nor did it indicate the Company's intention to visit reprisal" on Anderson or Kaufman. It could not, therefore, be considered at all probative with respect to the motive for Anderson's discharge. Lawson Milk Co. v. N.L.R.B., 317 F.2d 756, 760 (Cobb's statement) (C.A. 6, 1963). In fact, by Kaufman's own testimony, Schwartz gave him an express assurance that he had no cause for worry (A. 425), and the way Anderson recalled Kaufman telling her about this conversation, was that Schwartz had said it was all "water under the bridge" (A.543). These were precisely the words Schwartz claimed he used (A.809).

With further respect to this "disappointment" conversation, if it is, arguendo, found relevant, the ALJ erred in refusing to permit counsel for the Company to cross-examine Kaufman on matters pertinent to this conversation and to his credibility generally. At trial, during cross-examination, the Company contended that Kaufman's asking around the Douglaston spa for Schwartz's home address, which prompted the Schwartz-Kaufman "disappointment" conversation (A.806-807, A.425), was not for any legitimate reason, but was an intentional attempt by Kaufman to aggravate, intimidate and harass Schwartz. We explained and incorporated this contention in an offer of proof, which was rejected by the ALJ (A.468-469; A.448-450). Had we been permitted to establish this thesis through cross-examination of Kaufman, it could well have turned the table with respect to Kaufman's credibility. (Schwartz denied the alleged

"disappointment" reference to Anderson, A.808-809). This was no minor, collateral matter, but was a direct challenge to Kaufman's credibility. Refusing cross-examination on such a matter was a denial of due process and prejudicial error. San-Tul Hotel Company, 192 NLRB 1177; Wheeler v. N.L.R.B., 314 F.2d 260 (C.A. D-C., 1963): N.L.R.B. v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 576-577 (C.A. 5, 1966).

The Board, in addition to Mr. Schwartz's innocuous "disappointment" statement, asserts, as further supposed evidence of unlawful hostility toward Anderson, the following: "Mrs.Schwartz, . . . showed her own hostility toward Anderson by refusing to accept a letter Anderson left with the receptionist for her about 3 weeks before the discharge" (A.54). The Board's statement here is based totally upon Anderson's hearsay testimony that she gave receptionist Dottie Schwinger a letter to deliver to Mrs.Schwartz, and that Schwinger later told her that Schwartz refused the letter, saying she did not want to touch anything from "that girl" (A.198).

We contend that this is a shocking effort by the Board to support its conclusions without regard to its duty to consider only substantial evidence. The above quoted finding by the Board as to Mrs. Schwartz's conduct is based purely and totally on hearsay (A.197-198): hearsay which we moved to strike (motion erroneously denied, A.198- but not relied upon by the ALJ in his decision), hearsay which was denied by Mrs.Schwartz (A.693), and hearsay which, as to the truth of the facts contained therein, could have been testified to by the receptionist

to whom Anderson allegedly gave the letter, who was, apparently, under subpoena by General Counsel, but who was never called as a witness by the General Counsel (A.161 , the "Dottie" referred to being Dottie Schwinger, the receptionist; see, also, A.518, A.382-383).

The rule is plain. "Mere uncorroborated hearsay ... does not constitute substantial evidence." Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 230, 59 S. Ct. 206, 83 L. Ed. 126; N.L.R.B. v. Yutana Barge Lines, Inc., 315 F. 2d 524, at 528 (C.A. 9, 1963); N.L.R.B. v. Lowell Sun Publishing Company, 320 F.2d 835 (C.A. 1, 1963). We are constrained to ask what meaning has burden of proof, if the Board can convict a company on such denied, uncorroborated hearsay? "Suffice it to say that . . . evidence of this character was neither probative, rational nor of value," and its receipt in evidence and the reliance placed upon it by the Board was "plain error." N.L.R.B. v. Lowell Sun Publishing, 320 F.2d 835, 841. Moreover, because General Counsel subpoenaed, but did not call receptionist Schwinger, an inference should be drawn that she would not have verified the truth of the facts contained in Anderson's hearsay testimony. N.L.R.B. v. A.P.W. Products, supra; N.L.R.B. v. Ford Radio & Mica Corporation, supra.

Not only is there a lack of probative evidence of unlawful motive as of March 25, 1974 with respect to Anderson, but a review of the credited evidence concerning Katz's conduct in

seeking to get Antone, Caron and Anderson to transfer, vividly and affirmatively demonstrates, contrary to the ALJ's conclusion (A.31) that the Company's conduct was the antithesis of an attempt to single out Anderson.

When it came to obtaining an employee to transfer to Woodmere (again, neither that transfer nor the requested transfer to Madison are challenged) the Company did not simply turn to Anderson. Supervisor Katz first called Antone, who said she could not transfer because of a babysitter problem (A.26). Katz responded to Antone, "if you can't, you can't" (A.388) which is similar (not disparate) to Katz's response in reacting to Anderson's refusal (the first refusal on March 12) in a later conversation ("Well, you can't do it" - Anderson's testimony at A.265).

After Katz called Antone about the Woodmere transfer she did not call Anderson; she called Caron. Caron said she could not go because of a transportation problem (A.26). It was only after calling Antone and Caron that Katz called Anderson, and, as already discussed, Anderson did transfer to Woodmere under amicable circumstances.

As to the March, 1974 transfers, the Company's conduct also evinces a lack of discriminatory design toward Anderson. According to the ALJ's decision, Katz, about March 12, called Antone, Caron and Anderson, in that order. Each declined a transfer (A.26-28). A week later Katz called Antone (A.28). According to Antone's testimony, she agreed to transfer because Katz was "insistent" that she do so (A.388-389).

As of March 22, Madison still had a staffing problem (A.28). Katz first called Antone about a transfer to Madison. Antone stated she had a babysitter problem. Katz did not then call Anderson. She called Caron. Caron had a transportation problem (A.28). Why all this effort and phone calls to Antone and Caron if all she wanted was to discriminate against and "single out" (A.31) Anderson?

Finally, on March 22, 1974, Katz, after first having called Antone and Caron, called Anderson, after this merry-go-round of phone calls, which had started on March 12, and forthwith, at the outset of the conversation, before the subject of the subways was raised, told her "she had to go to Madison" (A.28, A.201), much as, the week before, she had insisted Antone go to Lefrak (A.388-389). Anderson, by her own admission, "absolutely" refused (A.264).

It was not as if Anderson was being asked to make a permanent change to Madison. The transfer was only to be temporary, as Anderson admitted upon being pressed (A.266). Thus, as of March 22, after a merry-go-round of calls, supervisor Katz was presented with an "absolute" refusal by Anderson to accept what was merely a <u>temporary</u> transfer to Madison - a garden variety transfer in the Company's operations.

Now what was Katz to do? Call Antone back? Call Caron? Continue on the merry-go-round? How long does a manager have to be tolerant at the expense of running a business? So, as the

ALJ found, Katz told Anderson at the very outset of their March 22 conversation that she had to go to Madison, and if she did not, she was no longer needed with the Company (A.28, A.201, A.266). In this posture, Katz's conduct toward Anderson on March 22, 1974 was not disparate. It was not discriminatorily motivated. She simply sought to compel her to go to Madison to meet the needs of the business - needs which are admittedly not questioned in this case by General Counsel. Had the last one she called this day been Antone, or Caron, they would have been the ones compelled to go to Madison under penalty of discharge.

To summarize, then, transfers between locations are a commonplace occurrence in the Company's operations. In March, 1974, an urgent need, not contested by General Counsel, arose for an employee at the Madison spa. Anderson absolutely refused a request that she transfer there temporarily, and she was discharged for that refusal. All this occurred over two months after the other alleged unfair labor practices toward Anderson, at the time when the Company, and Anderson, were, admittedly, on amicable terms. There is no evidence of any disparate treatment. General Counsel has failed to meet his burden of proof that the discharge of Anderson was other than lawful.

POINT II - PAULETTE ANDERSON'S THURSDAY HOURS WERE LAWFULLY REASSIGNED TO A FULL-TIMER IN JANUARY, 1974

The governing principle here is that the Board may not substitute its judgment for that of management, determine that management's judgment was implausible, poor or unwise, and then infer, by virtue of a "180° turn", an unlawful motive. N.L.R.B. v. McGahey, supra, 412-413; N.L.R.B. v. Sebastopol Apple Growers Union, 269 F.2d 705, 712-713 (C.A. 9, 1959); N.L.R.B. v. Ogle Protection Service, Inc., 375 F.2d 497 (C.A. 6, 1967); N.L.R.B. v. Houston Chronicle Publishing Co., 211 F.2d 848, 854-855 (C.A. 5, 1954); N.L.R.B. v. Audio Industries, 313 F.2d 858, 861, 863 (C.A. 7, 1963). In adopting the ALJ's decision that Anderson's hours were unlawfully eliminated, a conclusion based solely upon the ALJ's rejection of management's business explanation as having only "surface plausibility" and as being "passing strange", the Board has, despite the repeated admonition of the courts, directly violated this principle (A.23).

In any event, the business reason for reassigning Anderson's Thursday hours from part-timer Anderson to a full-timer, was a good, sound reason. On Thursdays, as on Tuesdays (both men's days), the instructress present does not perform her usual duties except for the giving of a few calisthenics classes (A.8, A.21). The female floor manager is not present, and the instructress' principal job is to perform various functions in support of promoting new memberships in the spa, including assisting the spa

manager. While a part-timer, such as Anderson, can perform functions supportive of sales, there are clear limits as to what she can do. She cannot handle membership renewals. She gives the Company only a limited number of hours per week (in the case of Anderson, this was some 16 hours per week prior to the elimination of her Thursday hours - see Resp. Ex. 9), whereas a full-time employee, who spends some 40 hours per week at the spa, is career and sales oriented, gets to know customers better, and is "much more involved than a part-time girl could ever be" (A.21, A.572-573, A.618, A.651-652). Harry Schwartz testified to the paramount importance of sales in the Company's operations (A.809-813, A.145-148).

In early January, 1974, the Company hired two new full-time instructresses, Jackie Balalaos and Jean Murphy (Resp. Ex. No. 9, A.21). Katz explained that the Company had experimented with having a full-time instructress present on Tuesdays, and that this had been "successful" and "worked out very well" (A.573). Therefore, concurrent with the hiring of these full-timers, it was determined that it would be desirable to assign the Thursday hours to one of them (A.21, A.573). Since then, only full-timers have been assigned to the Thursday position (A.654-655, A.618-619).

The ALJ, for the most part, correctly recites all this (A.21), but then rejects this explanation because he completely misreads it (A.23). He states that it has only "surface plausibility", and that it is "passing strange" that the Company would

replace a satisfactory, cooperative and responsible part-timer, such as Anderson, with a new, inexperienced full-timer, particularly, he says, as the employee would be working without supervision on Thursday. Therefore, he concludes, inversely, that the Company violated the Act. This is the totality of the ALJ's self-styled "critical analysis" (A.23), an analysis repeatedly rejected by the courts (see cases cited supra).

Aside from this error of law, the ALJ completely missed the point. The decision to reassign the Thursday hours to a full-timer had nothing at all to do with whether Anderson had been a satisfactory or responsible employee. It was based solely upon the Company's distinction between part-timers and full-timers, vis-a-vis sales and career orientation, and its policy of permitting full-timers, but not part-timers, to take membership renewals.* Nor was the absence of supervision our point (See A.651-652). The fact is that, despite the absence of the female floor manager, the instructress on duty on Tuesdays and Thursdays is supervised by, and assists, the spa manager, so that she is not without supervision (A.21, A.413, A.480, A.572).

The effect of the Board's decision, on this aspect of the

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*We would note that this distinction appears in the record in another context as well concerning full-timer Tausek (A.741-742, A.56). Moreover, as the payroll sheets show, full-timers are salaried, whereas part-timers are paid on an hourly basis (Resp. Ex. No. 9). The ALJ's observation that part-timers, and full-timers, are all hourly paid, is simply erroneous(A.8).

case is, as a practical matter, to immutably fix Anderson to Thursday hours. She was a good worker. She had engaged in union activity. She had testified. Whatever we said here in explanation of the elimination of Anderson's hours could not possibly withstand the ALJ's "critical analysis" and "passing strange" criteria. Is it "passing strange" that the decision to replace Anderson with a full-timer coincided with the hiring of two full-timers? Is it "passing strange" that only full-timers can handle sales to new members and take renewals, that having a full-timer assigned on Tuesdays had worked out well, and that the Company wanted to have such a full-timer available for that reason on Thursdays? The plain truth is that the Company has stated strong, sound reasons for the reassignment of Anderson's Thursday hours to a full-timer. In any event, rejection of these reasons as "passing strange" does not suffice to fill the glaring gap in General Counsel's burden of proof. Nor does the existence of other unfair labor practices, arguendo, serve to fill that gap. Interlake Iron Corp. v. N.L.R.B., 131 F.2d 129, 133 (C.A. 7, 1942). Anderson's Thursday hours should therefore be held to have been lawfully eliminated.

POINT III - THE COMPANY WAS DENIED DUE PROCESS OF LAW BY THE BOARD'S FINDING UNLAWFUL WORK ASSIGNMENTS BASED UPON THE ALLEGED CONDUCT OF ELLEN BREZENOFF.

Due process of law requires that a respondent be given timely notice of, inter alia, the names of its agents who are alleged to have committed the unfair labor practices. Such

notice should normally come "prior to the hearing." N.L.R.B. v. Majestic Weaving Co., 355 F.2d 854, 861 (C.A. 2, 1966). Moreover, "[i]t is well established, specifically by the statute [Administrative Procedure Act], by the case law, and by the principles of fundamental fairness that one cannot be found guilty of an offense not encompassed by the complaint or of which he had no fair notice" [citations omitted]. N.L.R.B. v. Tennsco Corporation, 339 F.2d 396, 399 (C.A. 6, 1964); N.L.R.B. v. Majestic, supra; N.L.R.B. v. Tamper, Inc., 522 F.2d 781, 789 (C.A.4, 1975 - "intolerable miscarriage of justice"). The Company had no proper notice of the alleged agency of Brezenoff, and, even if it did, the scope of the Board's findings far exceeded the limited agency alleged (A.16, A.18).

Prior to trial, the Company moved for a bill of particulars in which General Counsel was to specify, inter alia, "With respect to paragraph 8(a) of the complaint ... which supervisor or agent of Respondent assigned the Charging Party [Anderson] and Caron to more arduous and less agreeable job tasks" (A.79). At the pre-trial hearing, which was incorporated in the present record (A.105-109), Judge Leff ruled, in part, in response to our motion for a bill of particulars, that the General Counsel should furnish the names of the supervisors or agents whom it was alleged "made" the alleged arduous work assignments (A.106).

In General Counsel's bill of particulars, the only agent of the Company named was Anita Katz, an admitted supervisor, who

was said to have "authorized" the assignments (A.85). We did not, and could not, have presumed this meant that someone other than Katz actually made the assignments, since the Judge had directed General Counsel to state who "made" the assignments. We presumed General Counsel was talking about Katz, since she was the one he had specified in his bill.

As the trial progressed we were further lead to believe, based on the testimony of Paulette Anderson, General Counsel's first and principal witness, that it was Katz who made the alleged more arduous work assignments (See A.169-172, A.174-175). The only mention in Anderson's testimony, with respect to Brezenoff, concerned a conversation which Anderson allegedly had with Brezenoff, which had nothing to do with assignment of work (A.173-174). Even when General Counsel again amended the complaint, to allege Joan Holland to be a supervisor, he did not allege Brezenoff as an agent of the Company (A.179). In fact, Anderson testified that she and Caron complained to Katz, not Brezenoff, about the alleged harassment (A.183-184), and there is no evidence that they mentioned Brezenoff's name to Katz. There is not a hint in her testimony that Brezenoff had anything to do with the assignment of work, not to mention extra work.

We proceeded to cross-examine Anderson upon the premise that she claimed it was Katz who made the alleged arduous work assignments. (See cross-examination of Anderson generally, and, particularly, A.236, A.237-238, A.240, A.242, A.254, A.255, A.299).

We asked no questions with respect to any involvement of Miss Brezenoff in the assignment of duties. No such role of Brezenoff had been suggested to us.

It was not until well into the second day of the hearing that we had any inkling that the Company would be held responsible for conduct of Brezenoff. At A.322, during Caron's testimony, we raised the question whether Brezenoff was alleged to be a supervisor or agent with respect to certain alleged conversations she had with Caron (A.320-322). General Counsel disavowed any claim of supervisory status, but he asserted Brezenoff was alleged to be an agent as to the assignment of cleaning duties in one "instance" concerning Caron. We vigorously objected (A.322-326). The ALJ concluded that it was permissible, at that late stage of the proceeding, to allege Brezenoff to be an agent because she was a "mere conduit" in assigning the work and had simply "transmitted an order" (A.325-326).

As it turns out however, neither Caron nor Anderson, nor any of the other instructresses (Balalaos, Murphy and Antone) called by General Counsel during the first four days of the hearing testified to even an "instance" of assignment of arduous work by Brezenoff to Anderson and Caron. The only reference at all to Brezenoff, in this respect, was an instance, testified to by Caron, where Brezenoff attempted to have Caron vacuum at the end of the night, saying Anita Katz wanted her to do it, and that, in fact, Caron refused to do it and left the gym (A.319-320). It is this

"instance" as to which we believe General Counsel had alleged Brezenoff's limited agency.

After the fourth day of hearing, when all General Counsel's witnesses had been called, save for Brezenoff, we obtained an adjournment of three weeks, from July 19 to August 13, 1974, to prepare our case (A.52, A.458, A.521). When the hearing resumed, Brezenoff was called as General Counsel's last witness, and she, in fact, claimed to have been the one who assigned extra work to Anderson and Caron (A.525-530). Surprised and confused, we cross-examined Brezenoff on this and other matters as best we could (A.531-542). We had not cross-examined any of General Counsel's other witnesses on this, and had not prepared for this, as none of them had claimed Brezenoff to have made the assignments to Anderson and Caron, and General Counsel had not alleged it, save for the "instance" noted above (A.323). General Counsel never moved to amend the complaint to allege her to be more than an agent in the one "instance", even after Brezenoff had testified. Nonetheless, the ALJ credited Brezenoff and based extensive findings upon her testimony, which the Board adopted (A.16, A.18).

The aforesaid procedure, and the findings based thereon, constituted a denial of due process. N.L.R.B. v. Majestic Weaving Co., supra; N.L.R.B. v. Tennsco, supra. No notice was ever given that Brezenoff was alleged to be a general agent in assigning the arduous duties. We had, throughout the case, objected strongly to this continued type of boot-strapping and amending by General

Counsel (A.112-113, A.158-163, A.164, A.179-182, A.240-241, A.290-291). We believe that the remark of General Counsel that, "We did not feel it necessary to furnish the name of Miss Brezenoff" (A.325), clearly reflects the kind of close-to-the-vest, lack of notice procedure which General Counsel indulged in (and to which we continuously objected), even in the face of Judge Leff's order that he furnish the names of those who "made" the work assignments (A.105-106). Cf., N.L.R.B. v. Stark, 525 F. 2d 422, 429 (C.A. 2, 1975 - General Counsel's interest should not be that he "shall win a case, but that justice shall be done").

POINT IV - THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S FINDINGS OF MORE ARDUOUS WORK ASSIGNMENTS TO ANDERSON AND CARON

The basic principle here is that the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight," and the ALJ's findings are not to be "given more weight than in reason and in the light of judicial experience they deserve." Universal Camera Corporation v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456. While questions of credibility are, primarily, for the Administrative Law Judge , "an Appeals Court is not precluded from independently determining what weight certain testimony which he [the ALJ] finds credible should be given when evaluating the record as a whole." Portable Electric Tools, Inc. v. N.L.R.B., 309 F.2d 423, 426 (C.A.7, 1962). We contend that the record here is so frought with unsupported generalities, conflicts between testimony and documentary evidence,

and inconsistencies between General Counsel's own witnesses, that the Court "cannot conscientiously" find that the Board's findings (A.15-20) meet the substantiality on the whole record test. Bon-R Reproductions, Inc. v. N.L.R.B., supra. We do not here seek to enmesh the Court in the Board's primary realm of fact finding, but only to enumerate and condense the crucial flaws in the evidence in order to demonstrate the lack of substantial evidence.

Cleaning the spa, instruction of spa members, and giving calisthenics classes are normal duties of instructresses (A.165, A.172, A.228-230, A.558-560, A.398-399, A.251, A.245). The ALJ found, however, that during the last two weeks of December, 1973, "or" into January (after the December 12 and 13, 1973 election), Anderson and Caron were assigned by Brezenoff and Katz, more of these duties than other employees, and that this constituted unlawful assignment of "more arduous" duties (A.15-20).

(a) Neither Anderson nor Caron, nor any other witness, testified at all to being assigned the alleged more arduous work by Ellen Brezenoff. (As support for this assertion, we can only refer the Court to a review of their testimony). In fact, in Anderson's and Caron's testimony as to their conversation with Katz, where they complained of being harassed, they made no reference whatsoever to Brezenoff having assigned them these duties (A.185-186, A.332-333). Nor, in the conversations they allegedly had with Brezenoff, did Brezenoff indicate that she had been told to assign them extra work (A.173-174, A.321-322). Nonethe-

less, as we have already noted, Brezenoff testified, and the ALJ found, that it was primarily Brezenoff who assigned them the alleged extra cleaning tasks and additional members to instruct (A.16, A.18, A.524-542).

This glaring dichotomy in the testimony is not mentioned by the ALJ, or the Board, in the decision. If there was any truth in Brezenoff's testimony that it was she who assigned the extra work, would not at least one of General Counsel's witnesses have corroborated Brezenoff? There is a point where even the sanctity of credibility findings must give way on the record taken as a whole. W. T. Grant Co., 214 NLRB No. 96; N.L.R.B. v. Payless Cashway Lumber Store of South St. Paul, Inc., 508 F.2d 24, 27-28 (C.A. 8, 1974). That point has been reached here.

(b) Anderson testified that it was "outlandish" that on Sunday, December 16, 1973 (the Sunday after the election) she had, at one point, 20 members' program cards assigned to her (A.254). The ALJ found this work assignment to be an example of the "arduous work" (A.18). Brezenoff, however, saw nothing at all unusual about that many cards (A.541, see, also, A.669-670). It turns out that, as to this one day, when Anderson claims part-time instructress Jonkowski was just standing around (A.16, A.235), Jonkowski was not even there. (Resp. Ex. No. 9 - payroll sheet for week ending December 21, 1973). That could in itself explain why, in addition to the usual Sunday rush, where an instructress has "at least" 15 cards (A.541), Anderson had "a large amount" (A.541),

though not an "outlandish" number, of cards. (Anderson admitted that, for example, absence of another employee due to illness would normally mean extra work for her - A.184).

(c) The testimony of General Counsel's witnesses as to extra work assignments given to Anderson and Caron, after the union election of December 12 and 13, 1973, is totally inconsistent, as to dates, with the weekly payroll records (Resp. Ex. No. 9, lodged with the Court).

The only date on which Anderson was at all specific and definite about allegedly being harassed with extra work, by Katz, was Sunday, December 16, 1973, 3 days after the election (A.237-238), and that is the day, as already noted, when Susan Jonkowski, who she claims was just standing around, was not even there.

Anderson testified distinctly to a conversation she allegedly had with Caron on December 17, 1973, four days after the election, concerning their belief that they were both being harassed by the assignment of additional duties (A.172-173, A.236-A.283). However, the payroll sheet for the week ending December 21, 1973 shows that neither Anderson nor Caron worked on December 17. The first date Caron worked after the election was December 19, 1973 (Resp. Ex. No. 9). Their alleged conversation could not have occurred on that date because Anderson testified that their conversation occurred before work (A.172-173). As of that time, Caron could not possibly have told Anderson that she had been harassed, as she had not yet worked since the election of Decem-

ber 12 and 13 (Resp. Ex. No. 9 - her last day of work had been December 11). (The harassment is alleged to have occurred after, and on the heels of the election, for a period of two weeks - A.85). Nor could the alleged conversation have occurred on December 26, the second date Anderson and Caron worked together after the election, or at any other time in December or January, since Anderson states that in this conversation Caron told her that she had been harassed on Friday (A.173), when the fact is that Caron did not work a single Friday from prior to the time of the election through January (Resp. Ex. No. 9; A.150, A.814-815 - check shows that for week ending December 14 Caron was paid for one day - Monday, December 10, and not for Friday).

There is a peculiar, erroneous uniformity in General Counsel's witnesses as to dates. Caron claimed the harassment started on December 17 (A.350). As already noted, she did not work on that day. Anderson claimed the same thing (A.237). She did not work that day either (Resp. Ex. No. 9). And Ellen Brezenoff, who the ALJ observed was a supposedly neutral witness (A.12), also readily agreed that on Monday, December 17, Caron came to work (A.530). Does not this uniformity smack of nothing but collusion?

(d) The sweeping, general testimony of General Counsel's witnesses as to assignment of extra work to Anderson and Caron was totally disproportionate to the limited number of dates involved. The period during which all the "arduous" work was assigned was specifically alleged to be December 16 through 31, 1973 (A.85),

which would be the two weeks immediately following the union election. Anderson specifically testified that, as best she could remember, this was the correct time period (A.236-237). Moreover, since Brezenoff, who the ALJ found allegedly assigned most of the extra work (A.16, A.18), left the Company on December 31, 1973, this alleged time period would, arguendo, seem to be corroborated (Resp. Ex. No. 9, A.537).* During this time period, Caron worked on only two dates, December 19 and December 26, and Rolinda Antone, another part-time instructress, worked on only one date of consequence - December 19 (Resp. Ex. No. 9). (On December 17 Antone also worked, but Anderson and Caron did not - Resp. Ex. No. 9).

Antone testified that, after the election (December 12 and 13) it seemed like Paulette and Debbie (i.e. Anderson and Caron) "were doing everything" (A.388). This sweeping generalization is an absurdity. She was only present one night, with Anderson and Caron, during this alleged two-week period after the election. Caron testified that, during December, Antone was assigned the 8:30 P.M. classes and complained "a lot" (A.363-364 - the alleged relevance here is that this was a class Anderson

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*Caron testified, in response to General Counsel's leading question, that it could have been "early January" when the alleged harassment ceased (A.329-331). However, in her affidavit, she stated that it was shortly after she gave testimony, which was on November 5, 1973 (A.317), that she began to be assigned extra work (which statement she conveniently explained was meant to refer to after the election - A.357-358). Caron was plainly not reliable here as to dates.

usually taught, but that Antone was assigned this class so Anderson could be assigned to extra cleaning work, A.16-17). How would Antone have complained "a lot" when she was only there one night - December 19?

Caron testified that during this period she had much more work (A.329). This claim is totally inconsistent with the fact that she worked only two nights during this period. And Anderson testified, that she and Caron, during this period, did all the "heavy" cleaning work - that "some nights" she would do the heavy cleaning and other "nights" Caron would (A.252, A.301). One would think that Anderson and Caron had worked more than two nights together during this period, but they did not (Resp. Ex. No. 9). And we note that while Anderson admits other employees were doing at least some types of cleaning (A.301), Antone, in contradiction thereof, claims Caron and Anderson were doing "everything" (A.388).

Ellen Brezenoff's testimony is similarly exaggerated and disproportionate to the amount of time Caron and Anderson worked. She testified "every evening" she gave both Anderson and Caron more work than anyone else (A.536, A.539). (Brezenoff's testimony is necessarily limited to the December 16 to 31 period because she left the Company's employ thereafter, A.537, Resp. Ex. No. 9). However, Brezenoff worked only on two dates with both Anderson and Caron - December 19 and 26. And on December 26, Antone was out sick (Resp. Ex. No. 9), so an extra load must have fallen then on Anderson and Caron. The point is that her sweeping testimony

is at odds with the limited dates and hours the employees worked.

The ALJ found that prior to the election Anderson frequently taught the 8:30 P.M. Calisthenics class, but that during the period "after the election" Antone was regularly assigned that class so that Anderson could start cleaning at 8:30 P.M. (A.16-17). The ALJ's broad finding cannot stand. Antone only worked one night with Anderson in the last two weeks of December - that was on December 19 (See Resp. Ex. No. 9).

(e) The testimony as to the assignment of more arduous duties (i.e. more cleaning, more members to instruct and more calisthenics classes) is a blanket of generalities totally lacking in specificity. Anderson's entire direct testimony on cleaning duties after December 16 was, in toto:

> "Q.*** Did these additional cleanup duties continue after that?
>
> A. This additional cleaning continued for about two weeks after that." (A.172).

On cross-examination, she could not elaborate (A.237-238). The work just "seemed" heavier. Caron on this subject, was no more illuminating. She testified, in toto, on direct, in one sentence, that she "felt," during the period after the election, that all the employees were not getting a "fair share" of the cleaning, and the "part-timers" (this term would seem to encompass more than just Caron and Anderson) were doing much more of the cleaning than the full-timers (A.329). The ALJ's decision itself reflects the non-specificity of the evidence (A.16-17).

The only two specific instances he refers to (December 16 assignments to Anderson, and Antone's being given the 8:30 calisthenics cla instead of Anderson, so that she could clean) we have already demonstrated to be erroneous, for reasons set forth supra. In fact, in support of our point, Antone admitted she may have told the Board investigator that she could not recall any incident where Anderson received extra cleaning work (A.405, A.390-391, A.400-402). Nor could Brezenoff pin down the matter (A.537).

The lack of specificity as to dates, which we have already touched upon, is also reflected by the ALJ's decision. He says the alleged work assignments occurred either to the "end of December or into January" - take your pick (A.15). Now which is it? If we pick December, Caron worked only two nights and Antone one night (aside from December 17, 1973 when neither Anderson nor Caron worked; Resp. Ex. No. 9), so how is all the sweeping testimony as to Caron and Anderson being assigned "everything" possible? And if the alleged harassment went into January, only Caron remembered, just like she erroneously remembered that the alleged harassment started shortly after she gave testimony on November 5 (A.357-358). And if the harassment went into January, Brezenoff, who, according to the ALJ, supposedly did all this assigning of work (A.16, A.18), was no longer working at the Company! (A.537, Resp. Ex. No. 9). The ALJ footnoted this conflict, as if it would somehow thereby disappear (A.15).

Here is another example of lack of specificity. Caron

claimed that, when she was allegedly being assigned extra program cards, which meant more members to instruct, that "a lot" of members complained that she was not paying enough attention to them (A.351). When asked if she could give the names of any such customers, she could not give a single name (A.351-352). Katz, however, testified without refutation, that a basic part of an instructress' job is to get to know the names of the spa's customers (A.591), and that no customers complained about inadequate service (A.590-591).

As one further example of the lack of specificity, we refer the Court to Caron's direct testimony on calisthenics classes, which we cannot decipher (A.330). We tried to clarify the situation, and as to the assignment of the number of calisthenics classes, Caron explained:

> "[I]t wasn't always consistent. It stopped and started, so I can't exactly make how many classes. It depends on the night ..." (A.362).

The ALJ points to only "one occasion" where the evidence was specific as to the assignment of perhaps an extra class to Anderson (A.19). That instance is perfectly consistent with what Caron said (i.e., the assignments were not always consistent). The evidence does not specify any other such instances, and the ALJ therefore could find no others.

(f) Jackie Balalaos testified that the terminology "light" and "heavy" was regularly used at the spa to distinguish among cleaning duties (A.381). Anderson and Caron made similar

references, claiming they were assigned the "heavier" duties (A.170-171; A.172, A.237, A.252, A.301). Rolinda Antone, however, denied this distinction (A.396), as did Katz (A.558).

If what we have reviewed above is taken into account, including reference to the record testimony cited, we believe, as a matter of law, that there is not substantial evidence to support the findings of arduous work assignments. The testimony is no more than blanket assertions that the harassment occurred, but when the questions are asked as to just who did what, when, and exactly what happened, the matter simply cannot be pinned down. General Counsel therefore failed to meet his burden of proof.

POINT V - THE BOARD'S FINDINGS OF UNLAWFUL WARNINGS TO EMPLOYEES, BY KATZ AND HOLLAND, BASED UPON THE AMENDMENTS TO THE COMPLAINT, CANNOT BE SUSTAINED

1. The Prejudicial Nature of the Amendments to the Complaint.

The six-month statute of limitations, contained in Section 10(b) of the Act, 29 U.S.C., Section 160(b), was prompted by the "complaint that people were being brought to book upon stale charges," and by a desire "to bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." Local No. 1424, I.A.M. v. N.L.R.B., 362 U.S. 411, 419, 80 S.Ct. 822, 4 L.Ed. 2d 832. Because of this underlying policy, the Courts have, in considering the propriety of complaint and amended complaint allegations made more than six months after the events alleged, given

consideration to the question of whether they were prejudicial to the defense of the party charged, even if they occurred within six months of the filing of the charge. Cf., Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 34, 98 L.Ed. 455, 74 S.Ct. 323 ("company was given adequate notice and was not prejudiced by the amendment"); N.L.R.B. v. Puerto Rico Rayon Mills, Inc., 293 F.2d 941, 947. (C.A. 5, 1961 - "Company does not allege or show that it was prejudiced...").

The Company was prejudiced by the amendments here. Not until July 16, 1974, the first day of the hearing, was the Company apprised that conduct of Holland in "early January," 1974, would be attributed to it, and alleged as a violation (A.179-182). Our payroll records first listed Holland as floor manager, a supervisory position, in February, 1974 (Resp. Ex. No. 9). We neither had notice from the charge (A.64) nor the complaint (A.66-71) that she would be alleged to be a supervisor. In fact, at the pretrial hearing, Counsel for General Counsel stated: "Yes, I think it would be correct to say when we supply the bill of particulars we will note who the supervisors are that we allege committed the 8(a)(1) and there will not be any others" (A.108). But the bill of particulars made no mention of Holland (A.85-89), nor did General Counsel's notice of intention to amend the complaint refer to Holland (A.91). Consequently, the Company had no notice it might be held responsible for conduct which Holland had engaged in until six months had passed from the time of the events in question.

The evidence was extremely confused and conflicting as to when Holland became a floor manager. (Resp. Ex. No. 9, A.547, A.603-604, A.602, A.501, A.376-377, A.366-367, A.840, A.594, A.639, A.660-661, A.670-671, A.386-387, A.395-396, A.507-508). This is precisely the type of stale situation the Section 10(b) limitation was designed to keep out of litigation. Local 1424, I.A.M. v. N.L.R.B., supra, 362 U.S., at 419, footnote 10. The ALJ noted we did not, he believed, explain why, as of January 23, 1974 Holland, and not Katz, had signed a piece of paper as "floor manager" if she was not floor manager (A.13). We did proffer an explanation (A.661, A.664), but the ALJ gave it no weight. Had the charge herein, or even the complaint of May 24, given the Company notice of the claims concerning Holland, perhaps at that earlier time an explanation more satisfactory to the ALJ could have been found.

Similarly, with respect to admitted supervisor Anita Katz, had the Company been apprised by the charge, or even by the May 24 complaint, that conversations she allegedly had with employee Ellen Brezenoff in November, or early December, 1973 (A.10-11, A.14-15) would be a subject of this case, efforts could have been made to gather and preserve evidence when memories were fresher. Katz was a supervisor over ten gyms (A.545-547), and it was an unfair burden to first give notice on July 3, 1974 (A.110-113), that she would have to recollect conversations back in December, 1973, well over six months earlier, wherein she was alleged to have made statements and issued a warning in violation of the Act.

The fact that we were granted adequate time to prepare our defense, and to litigate the issues, as to Holland and Katz, did not cure the prejudice inherent in the lack of notice. No matter how much we prepared or litigated, the adequacy of that preparation and litigation was severely limited by the fact that it was not until after six months that we had the slightest reason to recollect and reconstruct the events pertaining to the complaint amendments.

2. Joan Holland was not a Supervisor within the meaning of the Act in January, 1974.

To establish supervisory status (and, as a consequence, employer responsibility), it must be shown that the alleged supervisor had authority to exercise independent judgment in performing the functions enumerated in Section 2(11) of the Act. The meager evidence that General Counsel did present (A.368, A.502-503) showed only that Holland, in January, 1974, when she allegedly made the unlawful remarks, was making some work assignments, and scheduling breaks and lunch hours. Whether she exercised any discretion in performing these functions was not demonstrated. This iota of evidence could not, therefore, suffice to establish supervisory status. Cf., Precision Fabricators, Inc. v. National Labor Relations Board, 204 F. 2d 567 (C.A. 2, 1953). In addition, given General Counsel's concession that Brezenoff was not a supervisor (A.11, A.322), it was totally inconsistent for him to have contended, and for the Board to have found, that Holland was a supervisor

as of January, 1974, since the evidence showed that Brezenoff performed the same functions as Holland (A.528, A.536, A.368, A.502-503) - as did all the full-timers (A.567, A.639).

The principal basis for the ALJ's erroneous conclusion as to her supervisory status in January, 1974, is the credited evidence that she had the title "floor manager" at the time she made the alleged unlawful statements (A.12-13). While it is true that floor managers and assistant floor managers are normally supervisors, and, indeed, we prevailed in that contention in the representation case (A.120), the presumption that such title is equivalent to supervisory status in the particular case of Holland is not applicable. The Company's payroll records show that it first listed Holland as floor manager for the payroll week ending February 8, 1974, and first paid her the increased compensation (from $125.00 to $150.00) as of that week (Resp. Ex. No. 9). Supervisor Katz testified she was present at the spa for almost 90% of her time until early February, and that she was the one in authority (A.547, A.602, A.604). Proof of this is found in a document, dated January 23, 1974 (A.99), in which Antone states she had told Katz (not Holland), that she could no longer work on Friday nights. Thus, while Holland signed this document as floor manager*, the text of the document itself demonstrates that Katz, not Holland, was the supervisory authority in the gym. Therefore, it could not suffice in this proceeding for

*Holland explained that she signed this document as floor manager presumptuously (A.661, A.664). The ALJ was thus in error in saying we gave no explanation why Katz did not sign it (A.13).

General Counsel to prove Holland's supervisory status merely by showing that she had a supervisory title when she made the remarks (expecially since Brezenoff, who is conceded not to have been a supervisor, apparently had a supervisory title; A.174, A.318). Rather, it was incumbent upon him to prove that status in the conventional way to demonstrate 2(11) authority, and, as already noted, that he failed to show.

The Board, in its decision, suggests that, in any event, Holland, even if not a supervisor, was an agent of the Company, and, therefore, the Company may be held responsible for her alleged remarks to Balaloas and Murphy (A.55). This theory is erroneous. It rests on the mistaken premise that the "source" of "instructions" allegedly given by Holland to Balalaos and Murphy was supervisor Katz (A.54-55). Suffice it to state that there is no evidence of record to show that Katz gave Holland instructions to tell Balalaos and Murphy to stay away from Anderson and Caron. The fact that Brezenoff alleges Katz told her (Brezenoff) to separate employees from Anderson and Caron (A.526), fails to show that Katz gave such instructions to Holland. As to Antone's rebuttal testimony, it is hearsay (A.841) as to what Katz may have said, was offered as we understand it, to discredit Arnott, and not as proof of the facts, and, in any event, the contents of that hearsay do not show that Holland was told to give any instructions to employees to stay away from Anderson and Caron (A.841, A.848).

3. Lack of Substantial Credible Evidence to Support the Board's Findings

The ALJ's findings, with respect to the warnings allegedly given employees Balalaos and Murphy, by Holland, illustrate credibility resolution gone mad (A.11-12). He acknowledges that, while Murphy stated Holland did not mention the union at all, Balalaos testified that Holland said the reason given her and Murphy for staying away from Anderson and Caron, and for the Company's wanting to get rid of them, was that they were big union supporters. The ALJ calls this a mere "discrepancy" (A.12), and then proceeds to conclude that it is this very "discrepancy" which proves these employees were telling the truth, because it supposedly demonstrates that the employees had not gotten together on their testimony prior to the hearing (A.12). He then appears to credit Balalaos over Murphy (A.11). Of course, had there not been any "discrepancy" (we call it a direct conflict) the Judge would simply have found the testimony of Murphy and Balalaos was corroborative! In a similar situation, the Board, in reversing an Administrative Law Judge's credibility finding, found such a "discrepancy" (there called a "variance" by the ALJ) too crucial to support an 8(a)(1) finding. Bomber Bait Co., 210 NLRB 673.

As in Bomber Bait, supra, the conflict here was on a crucial point. If Holland made no mention of the union, as Murphy clearly testified (A.502, A.508-509), no reasonable basis exists to conclude that Balalaos and Murphy related Holland's remarks to concerted or union activities, and they could not have felt restrained,

therefore, from engaging in such activities. Murphy's direct contradiction of Balalaos was thus, under Bomber Bait, fatal to the finding of a violation.

The ALJ found that, on December 19, 1973, Katz issued to Caron a warning notice for not having called the spa on December 12, to say she would be absent, when, in fact, Katz knew she had called in, and that this violated the Act (A.14-15). Assuming, arguendo, that the factual findings here remain undisturbed, they are not sufficient, on the record as a whole, to support an inference that the motivation behind the issuance of the warning was Caron's union activity. The warning notice contained two warnings, and General Counsel did not claim the second warning to be a violation. That latter warning was for Caron's failure to call and confirm if she would be in to work on December 17 (A.128). It was the latter warning which precipitated Katz's issuance of the written warning. As Katz testified, Caron, although promising to call her on December 17, in the event she could not come in, failed to call (A.553-554). Caron claimed she recalled the December 17 incident, but that Katz said she did not have to call again (A.346-347). The ALJ did not resolve this conflict. Caron was plainly confused. She erroneously claimed that the second warning was for not performing her cleaning duties (A.320-321), and she erroneously stated that she was given the warning on December 17 (A.320). Caron's general confusion at this time is also reflected by her testimony that she reported to work and spoke with Katz on Friday, December 14, about not having called in, when the payroll records show she

did not work on that date (Resp. Ex. No. 9, A.150 - a weekly check for one day's salary). Hence, at the very least, the second warning on the December 19 warning notice, not alluded to by the ALJ, was valid. Given, then, the validity of this portion of the warning, Katz's act in issuing the warning was not unfounded.

The ALJ may have reasoned that Katz's motive in issuing the warning was, at least in part, motivated by unlawful considerations because, as to the portion of the warning relating to December 12, Katz, in fact, knew Caron had called in. Assuming Katz did know that Caron had called, this shows no more than that Katz issued the December 12 portion of the warning to Caron because of a hostility between them not related to union activity; a hostility which the ALJ recognized in reference to his discussion of the reduction in Caron's hours (A.25). Indeed, if Katz was acting out of some scheme or plan to harass Caron for her union activity, surely she would have conceived of some more defensible plan than to intentionally issue a warning which another employee, Brezenoff, a friend of Caron's (A.532-533), could state, to her own knowledge, was false.

Further evidence of Katz's lawful motive is found in Katz's conduct in issuing the warning to Caron. Katz did not, as the ALJ found, "direct" her to sign the warning, or "require" her to admit to the rule infraction (A.14). She only "asked" that Caron sign it (A.321), and, upon her refusal, simply made a note at the bottom of the warning that Caron had refused to sign (A.128). No action was taken against Caron for her refusal to sign.

The above discussion, which we premised, arguendo, on the ALJ's having credited Brezenoff, Balalaos and Murphy, is not to suggest for a moment our acceptance of those findings. As cognizant as we are of this Court's limited review, the ALJ was, nonetheless, in error in crediting them on the ground that he believed them to be disinterested witnesses (A.12, A.15). They were clearly friends of Anderson and Caron, and had come to the hearing solely to testify in support of Anderson and Caron (A.532-533, A.525, A.380, A.505, A.371). Balalaos and Murphy both clearly bore aminosity toward the Company because of the circumstances under which they were terminated (A.509-510 - although we claimed Murphy quit, she said, "I know I was fired"; A.379 - Balalaos said there were "things [the Company] did against other people"; A.375-376 - Balalaos was given an "ultimatum"). Balalaos sharply revealed her bias when she readily agreed that, in January, 1974, Caron and Anderson were receiving more work than "in the past" (A.378) despite the fact that she could not possibly have known what past assignments were like, as she first began to work for the Company in January, 1974 (Resp. Ex. No. 9, A.364).

With particular respect to Brezenoff, aside from her uncorroborated effort to support Anderson and Caron (discussed supra, pp. 45-46), and the peculiar erroneous uniformity in one particular respect with respect to Anderson and Caron's testimony (see p. 48, supra) she was a flippant witness (A.535, A.536). Moreover, her allegation that Katz told her to not associate with Anderson so as

to keep her "record clean" came only after her flat denial that anything else was said, followed by a suggestive question (A.526), and even at that she saw no threat in what Katz said (A.532).

Finally, we observe that the ALJ erroneously dismissed the testimony of our witnesses, on the sole ground that they were "employed by the Respondent" (A.12). "That the witness was or is an employee of the party in whose behalf he testified is not in itself a reason to discard his oath..." N.L.R.B. v. Tex-o-Kan F. Mills Co., 122 F.2d 433, 439 (C.A. 5, 1941). See also, Rotek, Inc., 194 NLRB 453, at fn. 1.

POINT VI - THE ALLEGATIONS OF THE COMPLAINT PERTAINING TO KAUFMAN ARE BARRED BY SECTION 10(b) OF THE ACT

The general principle governing the extent to which a charge is a predicate to a complaint has been clearly stated by this Circuit: The allegations contained in the complaint must have occurred within six months of the filing of the charge and they must be "closely related" to the violations named in the charge. N.L.R.B. v. Dinion Coil Company, Inc., 201 F.2d 484 (C.A. 2, 1952) - cited by the Board in its brief at p. 29; N.L.R.B. v. Pecheur Lozenge Co., Inc., 209 F.2d 393 (C.A. 2, 1953). We contend that the allegations in the complaint that Kaufman's hours were unlawfully reduced and his calisthenics classes unlawfully eliminated are not "closely related" to the charge herein, filed by Anderson, and that therefore the complaint, as to Kaufman, must fall.

The charge in this case, filed by Anderson, an individual, alleges solely that she was discriminated against (A.64). Her charge contains the standard form "other acts" clause. This, however, did not give the Board "carte blanche...to range far and wide over the entire field of employer unfair labor practices." Champion Pneumatic Machinery Co., 152 NLRB 300, 303; Prince Pontiac, Inc., 174 NLRB 919, and it was not free to "expand the charge as [it] might please, or to ignore it altogether." N.L.R.B. v. Fant Milling Co., 360 U.S. 301, 309, 79 S.Ct. 1179, 3 L.Ed.2d 1243. It could only allege, in its complaint, matters "closely related" to the violations set forth in the charge, N.L.R.B. v. Dinion Coil, supra.

The issue presented, therefore, is what does "closely related" mean? The determination of this question appears to rest upon an analysis of the facts, and the extent to which they are interrelated. In Dinion Coil (cited by the Board at p. 29 of its brief) a group of employees, all union supporters, were discharged. A week later, one Tennent, also a union supporter, was discharged. He was discharged for precisely the same reason as the group let go the week before. In fact, the wording of his termination notice was identical to the notices given those discharged as a group. It was held proper to amend the complaint to allege (inter alia) Tennant as a discriminatee, even though he was not named in the charge, as his case was closely related to that of the other employees.

In Pecheur Lozenge, supra, the several charges which constituted the basis for the complaint, alleged only 8(a)(1) and

(3) violations, concerning discharges, and refusals to rehire, with respect to approximately 30 employees. The Board, in its complaint, alleged, inter alia, an 8(a)(5) refusal to bargain, although it had not been alleged in the charge. The Court upheld this complaint allegation, stating that "the entire series of events, including the earlier refusal to work overtime, the resulting layoffs, the strike, the request for reinstatement and the refusal to bargain, are all closely interrelated" [emphasis supplied] 209 F.2d., at 401.

In addition to the holdings of these cases, that "closely related" encompasses a series of interrelated events, the Supreme Court has stated that, where, after a charge is filed, subsequent unfair labor practices occur, which are related to the allegations in the charge, and "grow out of them" while the proceeding is pending before the Board, that such occurrences may be properly alleged in the complaint, because the Board may treat "a whole sequence as one." N.L.R.B. v. Fant Milling Co., supra; National Licorice Co. v. N.L.R.B., 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799. The Supreme Court, however, has expressly left undecided the question, presented here, as to "how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it." Fant Milling, 360 U.S., at 306-307, quoting from National Licorice.

The only relation that can be said to exist between Kaufman

and Anderson is that they were both active participants in the Local 966 organizational campaign through the time of the election. Aside from that, however, the operative facts as to the alleged discrimination as to Anderson and Kaufman are essentially separate and apart (except for a single non-probative incident noted below). There is no related sequence of events. General Counsel's proof as to Anderson's case involved witnesses and a chain of evidence that had nothing at all to do with Kaufman. (See testimony of Anderson, Caron, Antone, Balalaos, Brezenoff, and Murphy). Conversely, evidence presented in support of Kaufman's case had nothing to do with Anderson (see testimony of Kaufman, Matinale, and Tausek). In fact, the lines of supervision, at the Company, for male and female employees, were separate, and each worked on different days, except Sundays, when they worked at different hours (A.8, A.687, A.547, A.782).

The only iota of evidence linking the two cases is that, as part of a lawful conversation with Company president Harry Schwartz, Schwartz allegedly stated that he and his wife were "disappointed" when Kaufman and Anderson had testified. As already discussed, supra, this alleged statement was not, in view of Section 8(c) of the Act, evidence of any unlawful conduct. And even if, arguendo, it has some miniscule evidentiary value with respect to Anderson's case, it is too much of a scintilla to reasonably have the effect of converting two entirely separate and distinct cases into "closely related" ones.

It is particularly appropriate, in this case, to hold that the charge does not support the complaint as to Kaufman. If ever there was an employee who would have availed himself of the Board's processes, had he felt discriminated against, it was Kaufman. He was, as the ALJ found, the "spearhead" of the Local 966 campaign (A.8). He solicited employees to sign authorization cards for Local 966, testified at the July and November, 1973 hearings, assisted the Local 966 lawyer, and was himself a witness (A.411, A.418, A.448). He conceded that he would not hesitate to inform the Local 966 attorney about matters pertaining to the union's campaign (A.444), and that he was well aware of the availability of the Board's office for filing unfair labor practice charges (A.460). Nonetheless, at no time did Kaufman choose to file a charge, nor did Local 966. There is therefore no special policy reason here for the Board, on its own motion, by way of complaint, to have sought to invoke its statutory duty because of some lack of sophistication on his part.

The ALJ, in rejecting our argument, cited, as support for his conclusion (adopted by the Board), Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 74 S.Ct. 323, 98 L.Ed. 455, affirming N.L.R.B. v. Gaynor News Co., 197 F.2d 719 (C.A. 2, 1952). However, the facts of that case only serve to prove our point that Kaufman's case is not closely related to that of Anderson. In Radio Officers' the charge alleged that the employer had unlawfully granted certain wage increases and vacation payments to union members while denying

them to an employee named Loner (the charging party), who was not a union member. In the complaint, the Board alleged such discrimination not only as against Loner, but against a whole group of non-union members not named in the charge. The complaint as to these non-members was held proper. This was logical because precisely the same facts which Loner had alleged to constitute discrimination as to him, i.e., the granting of benefits, on one day, to all union members, while withholding them from non-union members (see 347 U.S., at 35) equally, and at the very same time, affected all others who were in the same situation as Loner (i.e., those who were not union members). In sharp contrast to that case, the facts as to Anderson, the charging party here, are completely different from those pertaining to Kaufman. The case of Exber Inc. v. N.L.R.B., 390 F. 2d 127 (C.A. 9, 1968), cited by the ALJ, is virtually the same as the Radio Officers' case, and is thus plainly distinguishable from the instant case for the same reasons.

Two of the cases cited in the Board's brief (at page 29), N.L.R.B. v. Puerto Rico Rayon Mills, Inc., 293 F. 2d 941 (C.A.1,1961) and Texas Industries, Inc. v. N.L.R.B., 336 F. 2d 128 (C.A.5,1964), are analogous, respectively, to Dinion Coil and Fant Milling, both supra, and are distinguishable from the instant case for the same reasons as are those cases. A third case cited by the Board, N.L.R.B. v. Kohler Co., 220 F. 2d 3 (C.A. 7, 1955), is also distinguishable. That case dealt with Section 8(a)(1) statements, 29 U.S.C., Sec. 158 (a)(1), alleged in the complaint but not in the

charge. The charge, unlike here, alleged some twelve 8(a)(3) discharges. The Court found that it was proper to allege the 8(1) statements because they were part of a "protracted struggle" (hardly the case here) between the union and the Company. To the extent some language in Kohler might arguably support the proposition that all occurrences in the course of a union campaign are inherently "closely related," we simply cannot agree with that holding, nor do this Circuit's decisions in Dinion Coil and Pecheur Lozenge, or the cited Supreme Court cases, supra, on the facts there presented, go that far.

In sum, Kaufman's case cannot be said to be "closely related" to the charge filed by Anderson, and the Board therefore was without statutory jurisdiction to allege, in the complaint, and to find violations as to Kaufman.

POINT VII - THE COMPANY LAWFULLY REDUCED KAUFMAN's HOURS AND LAWFULLY CEASED ASSIGNING CALISTHENICS CLASSES TO HIM

1. Reduction in hours

The Board, in concluding that Kaufman's hours were unlawfully reduced, erroneously shifted the burden of proof to the Company, as is proved by its reasoning, in finding a violation, that "nothing" in the credited evidence except Kaufman's union activity and testimony would account for the reduction in his hours (A.57) (See N.L.R.B. v. McGahey, supra). Moreover, its conclusion that the reduction in Kaufman's hours was "drastic" (A.58) contradicts the undisputed evidence as to hours changes.

As already described, supra, at pp. 10-11, changes in the hours of part-timers are a normal condition of employment. The Board itself found that they occur with "some frequency" (A.55). And it held a reduction of Kaufman's hours by 4 1/2 in October, 1973, and of Caron's by two, in February, 1974, to be lawful (A.55-56,A.23-25).

Remaining at issue is a reduction in Kaufman's weekly hours from 20 1/2 to 16 1/2, as of the payroll period ending February 15, 1974, and then to 9 1/2 as of the week ending February 22, 1974. (Resp. Ex. No. 14, - copy lodged with the Court; A.708-710). While Kaufman's scheduled hours were so reduced, there were three weeks (February 15, February 22 and March 3) where he actually worked more than these scheduled hours (Resp. Ex. No. 14, A.708-710). Thereafter, Kaufman remained at 9 1/2

hours until the latter part of June, 1974, when his hours went up to about 15 per week (A.434-437).

Almost concurrent with the reduction in Kaufman's hours was a reduction in part-timer Phil Matinale's hours. Matinale was, next to Kaufman, the second most senior male part-timer at Douglaston (A.473). (We make this point to show the lack of significance of seniority). As of the payroll period ending January 4, 1974 his hours were reduced from 22 to 17 1/2 per week. They remained substantially at that level until the payroll period ending February 29, when they were reduced to 8 1/2, and remained at that level until the latter part of June, 1974 (Resp. Ex. No.14), when they went up again, to anywhere from 11 to 36 hours per week (A.483-484). The Board expressly found that the reduction in Matinale's hours was lawful (A.56, footnote 5).

Other hours reductions of Douglaston part-timers, at other times, comparable to that of Kaufman, also appear in the record. Bruce Kaufman went from 24 hours to 11 hours per week. Joe Isgro went from 22 1/2 hours down to 12. Bob Cash went from 30 hours down to 11 1/2 (Resp. Ex. No. 14). Richard Kaufman had himself been reduced from 31 hours to 25 hours (Resp. Ex. No. 14). He agreed that hours changes were hardly a shocking thing, and that employees often were unhappy about reductions in their hours. (A.861 ; and see Antone's testimony on rebuttal, A.842, A.844). And supervisor Bostinto gave several examples of cuts in hours in other spas similar to that which affected Kaufman (A.786).

Given, therefore, this extensive evidence as to the normal nature of the reduction in Kaufman's hours, and particularly the almost identical cut in Matinale's hours, over the same period of time, which the Board expressly found to have been lawful (A.56), the General Counsel had a particularly heavy burden to show that the hours reduction as to Kaufman was unlawful - a burden which, we believe, he fell far short of meeting.

The Board, however, appears to find that General Counsel did sustain that burden on essentially two grounds: (1) the alledged statements of manager Karpf made to Kaufman and Matinale in June, 1974, and, (2) its rejection (and, we would add, misreading) of our explanation for the hours reductions (A.56-57; A. 32-33; A.36-38).

Karpf's alleged remarks to Kaufman and Matinale, in June, 1974 (over four months after their hours had been reduced), that they should forget about the "vendetta " and that they would be given more hours (A.32-33), do not serve to sustain the inference that in fact, over the past four months, Kaufman's hours had been reduced because of union activity. Karpf, until June, 1974, was alien to the Douglaston situation. He had just arrived at, and become manager of, the Douglaston spa at the time of these remarks. Karpf's alleged statements, if, somehow, believed, reflect no more than that he erroneously presumed there had been a vendetta. Indeed, the fact that Karpf is alleged to have spoken of the very same vendetta, and promised more hours to Matinale (A.32-33), who

Karpf did not know (A.490), who is not alleged to have been a discriminatee, who was not a known union supporter, and whose hours had been lawfully reduced, all as the Board found (A.56), proves that Karpf spoke presumptuously of a vendetta and without any basis in fact.

As to the Board's rejection of our explanation for the bona fides of the hours reduction of Kaufman, the Board has made serious errors. We explained, first, that Kaufman's hours were reduced because "we had to cut hours back, just for the economics ... we didn't need these people on" (A.741). The Board, however, rejects this because "unlike in October, 1973, in February, 1974, there was no broad reduction of hours and no stable new schedule of hours to corroborate" this business justification (A.56-57).

We never claimed we have some kind of "broad" reduction in hours, or to have "stable schedules," as the Board seems to presume (See A.785-786). The fact is, however, that hours were cut in February - a total of some 25 1/2 hours between Matinale and Kaufman (Resp. Ex. No. 14). This cut brought them down to approximately the same hours as part-timer Dennis Pillinger, who had been working 9 hours (and who, as of February, 1974, had been working for the Company for one year), so that the three long-term part-timers were all working just about 9 hours.

The Board also observes, in rejecting the bona fides of the reduction in hours as to Kaufman, that the hours of two new part-timers gradually increased and continued to rise in March, while Kaufman's and Matinale's stayed the same (A.56). First of

all, the fact that Matinale's hours were lawfully reduced as much as Kaufman's, and remained at a lowered level for as long as Kaufman's, logically negates any significance at all to the fact that two other part-timers received more hours.

The two new part-timers taken on were Larry Moskowitz and Al Romeo. Their hire largely correlated with the cessation of employment of part-timers Cash and Isgro (Resp. Ex. No. 14). We hardly think that the Company was obliged to refrain from replacing them and, somehow, give all of Cash's and Isgro's hours to Kaufman and/or Matinale. Nor would that have been possible, as coverage, in terms of numbers of employees necessary to service the spa, would be a factor, and not just the number of hours an employee is assigned.

With respect to Moskowitz, he was given hours because the Company had viewed him as a charity case. Moskowitz, as supervisor Wolf explained, had been a stock boy in the Company's health food store. He had no father, had little money, did not have many friends, and seemed to have the whole world on his shoulders. Harry Schwartz had therefore promised him part-time hours when he reached his seventeenth birthday, or if he got good marks in school (A.743, A.790-791). There is no evidence to refute this explanation. The hours Moskowitz got simply, therefore, proves our point that hours are assigned in a somewhat "madcap" manner and are distinctly "unsystematic" (A.786, A.801-802, A.743, A.517). Cf., Morristown Knitting Mills, 86 NLRB 342, at 360-361. The case as to Moskowitz therefore does nothing to show discrimination against

Kaufman.

Of course, the Board suggests that Al Romeo, another part-timer, or perhaps someone else, should have been given fewer hours, and that Kaufman could have had more (A.56). Instead of giving hours to Romeo, perhaps we should have given them to Matinale or Pillinger. Would not the Board still complain about Kaufman? Romeo worked no more than 13 hours (Resp. Ex. No. 14). We suppose we could have given him only 8, and brought Kaufman up to 14 1/2. But that would not satisfy the Board either. We would still owe Kaufman 6 hours (i.e. to put him back to the 20 1/2 from which he is alleged to have been unlawfully cut). The Board simply has not proffered any valid reason to discard our business explanation.

We also explained that a factor in reducing Kaufman's hours was his reduced job performance and poor attitude. This was based upon supervisor Wolf's testimony (A.742). Wolf had written a memorandum to Company supervisor Bostinto critical of Kaufman because he felt the latter resented taking orders from him. Wolf suggested, in that memo, that Kaufman be transferred (A.144). The authenticity of this memo is unchallenged (A.737-738, A.745-746).

The Board states the following with respect to this memo: "Although Respondent had previously considered transferring Kaufman because, as a very popular instructor, he might help business at another spa, Respondent this time rejected, without any explan-

ation in the record, the option of a voluntary transfer to solve its alleged problem with Kaufman" (A.57) [emphasis supplied]. The Board implies, by this observation, which is completely erroneous, that we therefore had no problem with Kaufman.

The fact is that Harry Schwartz did explain, clearly, expressly and directly that when he received the memorandum from Wolf, he discussed the matter with area supervisor Bostinto and instructed him to do nothing about it and to "leave it lie" (A.805). Schwartz told Bostinto he did not want to take any action, such as discharge or additional warnings, and thereby end up at the Labor Board with more lawyers costs, etc. (A.805). Bostinto corroborates Schwartz (A.789). Wolf testified he was told he would just have to "live with" Kaufman (A.739).

Moreover, this explanation for not transferring Kaufman was similar to the reason the Company had not previously transferred him, a fact which the Board overlooks (A.57). As ALJ Stevenson found in the prior case, the Company, in June, 1973, lawfully decided to transfer Kaufman to another spa, but refrained from effectuating the transfer because of the advent of Local 966 and its demand that there be no transfers. (See page 5 of prior decision). Obviously, then, as in the instant case, the Company wanted to avoid a charge that the transfer was discriminatory, and thus refrained from making a transfer. In short, the Board's observation that we gave no explanation for not transferring Kaufman is plain error.

The Board observes that, "Nothing in Wolf's memorandum suggested that Kaufman had become an unsatisfactory employee or that the value of his services, save in his relationship to Wolf, had been affected"[emphasis added] (A.57). The Board here, in effect, concedes that the value of Kaufman's services, vis-a-vis Wolf, had diminished. This proves our point. Wolf was, after all, Kaufman's immediate supervisor, and it was Wolf who took into account Kaufman's attitude and performance in reducing his hours (A.742). Wolf's statement, in the memo, that Kaufman resented taking orders from him (A.144) is entirely consistent with, and corroborative of, all his other testimony that Kaufman's attitude and work performance were poor (A.732-737). The above quoted observation by the Board, therefore, is not at all adverse to our position.

A consideration which the ALJ cited, in rejecting Wolf's explanation of Kaufman's poor attitude and job performance, was that, while it may have been true that Wolf did not issue a third warning notice to Kaufman for his many derelictions of duty out of his friendship with him, since that could have meant discharge (A.37, A.770), surely some other supervisor would have issued such a warning, if Kaufman was in fact derelict in his duties (A.37). That observation, however, is incorrect. As Harry Schwartz testified, the very same reasons he did not comply with Wolf's request to transfer Kaufman, were the reasons management did not take any other disciplinary actions, such as further warnings,

or discharge, against Kaufman (A.805, A.801).

The ALJ observed that one of the two warnings which Kaufman received from Wolf, dealt with a failure to clean which had, in fact, been excused by Frank Bieler, who was floor manager (A.37). However, the record shows, without refutation, that Bieler was a close friend of Kaufman's, a Local 966 supporter, and had completely slacked off his job at the time in question, which necessitated Wolf's acting in his place and stead (A.732, A.478-A, A.443, A.444, A.731, A.63). Bieler's excusing Kaufman therefore has no weight as to the bona fides of the warning Wolf issued, particularly as Wolf testified, without refutation, that Bieler never told him he had excused Kaufman (A.747-748).

Finally, the ALJ noted that Wolf had called Kaufman and Matinale his two best instructors, and that this showed Kaufman's performance and attitude were satisfactory (A.38). Wolf's statement was, however, perfectly consistent with Wolf's approach to Kaufman. Thus, Wolf, a friend of Kaufman, who had attended Kaufman's birthday party before he testified (A.770), had refrained from issuing a third warning notice to Kaufman because he did not want him discharged. Consistent with this conduct of trying to keep Kaufman employed, it was natural for him, in an off-handed, introductory manner, to refer to Kaufman, and Matinale, as his best instructors. Wolf's conduct in refraining from issuing a third warning and in complimenting Kaufman was thus consistent with his attitude of supporting Kaufman as a friend, despite Kaufman's

failing job performance. The Judge's rejection of Wolf's statement that he made the "best instructor" remark as a morale booster, without explanation, is thus arbitrary, particularly since his statement is consistent with the other evidence. And the fact that Wolf made the same "best instructor" remark concerning Matinale, who also was not performing well, and whose hours were also cut, further serves to prove our point. (A.761, A.746, A.764-766).

In any event, the only ground which the Board can properly point to at all to affirmatively support its conclusion is Karpf's alleged statements - not the lack of an adequate explanation by the Company (N.L.R.B. v. McGahey, supra) and, as already noted, Karpf's statements do not suffice to establish that Kaufman's hours were, in fact, unlawfully reduced, particularly in view of the fact that Matinale's hours were found to have been lawfully reduced at the same time. While the Board was prepared to rest its disparate treatment holding as to Anderson on the slim, at best ambiguous, peg of an incident concerning Antone, supra, it was totally unwilling to conversely give weight to the strong evidence of like treatment of Matinale, as compared to Kaufman, to support the lawful nature of the Company's conduct toward Kaufman.

2. Elimination of Kaufman's Calisthenics Classes

There is no question that Kaufman's calisthenics classes were eliminated. However, no affirmative evidence at all was presented to show that his classes had been eliminated for a discriminatory reason. The issue, therefore, is whether the Board's re-

jection of our explanation for the elimination of his classes sufficed to establish an inference that, in fact, their elimination was unlawful.* We contend that no such inference was permissible. The "burden was on the [B]oard to make out its case and not, as the [B]oard seems to think, upon the [Company] to defend itself". N.L.R.B. v. MacSmith Garment Co., 203 F.2d 868, 871 (C.A.5, 1953); N.L.R.B. v. McGahey, supra.

Moreover, a significant factor, overlooked by the Board, which supports the lawful nature of the elimination of Kaufman's calisthenics classes, is that Kaufman admitted that he failed to register any complaint when he was notified of their elimination (A.450-451). In fact, his only comment was that it meant "less work" (A.451,A745). Kaufman's reaction hardly demonstrates the outcry of one who feels discriminated against. Kaufman never filed a charge. As far as the record shows, Kaufman never viewed his reduction of calisthenics classes as discriminatory until Anderson's charge was filed. Kaufman's placidity was simply adverse to any suggestion that his calisthenics classes were discriminatorily reduced.

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* We note that the ALJ's rejection of our explanation was, in any event, an error. He states that Harry Schwartz's testimony that he did not want only one man (Kaufman) teaching coed calisthenics classes, is contrary to evidence that others, as well as Kaufman, were teaching such classes. We find no such evidence, and Kaufman testified that only he taught such classes (A.453-454).

POINT VIII - THERE IS NOT SUBSTANTIAL EVIDENCE TO SUSTAIN THE BOARD'S 8(a)(4) FINDINGS

To support an 8(a)(4) finding, the Board must affirmatively demonstrate that an employee's testimony was a motive for the discharge, and an 8(a)(3) finding does not automatically compel an 8(4). N.L.R.B. v. I. Posner, Inc., 342 F.2d 826 (C.A.2, 1965); Mueller Brass Co., 208 NLRB No. 76; Martin Theatres of Georgia, Inc., 169 NLRB 108, 110. The proof in this case fails to show an 8(a)(4) motive.

As we have already discussed, Schwartz's alleged statement to Kaufman that he and Mrs. Schwartz were "disappointed" when he and Anderson testified, may not be properly regarded as evidence of any unlawful motive. The statement was unaccompanied by any threat of reprisal at all. This alleged statement is the only iota in the record bearing on prior testimony of employees. The few other alleged statements by Katz and Holland relate only to the union activity, and are not reasonably susceptible of reference to prior testimony. General Counsel therefore failed to sustain his burden of proof with respect to the 8(a)(4) allegations, and the Board's findings cannot be sustained.

POINT IX - THE BOARD'S ORDER IS TOO BROAD

1. There is no warrant in the record for a cease and desist order which would apply to the Company's conduct toward "any other labor organization" (A.47). The union activity here did not involve any labor organization other than Local 966. If,

indeed, arguendo, there was unlawful opposition to the union here, it may well have been motivated by the Company's view as to the questionable conduct and background of this particular union, and not by opposition to unions generally (A.468, A.803). No acts against employees who were active on behalf of any other labor organization have been shown. N.L.R.B. v. J. W. Mays, Inc., 356 F.2d 693 (C.A.2, 1966); C.W.A. v. N.L.R.B., 362 U.S. 479, 80 S. Ct. 838, 4 L. Ed 2d 896; Brewers and Maltsters Local No. 6, I.B.T. v. N.L.R.B., 301 F.2d 216, 227 (C.A.8, 1962).

Although it is true that Local 10 petitioned the Board, in June, 1963, to represent employees at the Kings Highway spa, its petition was dismissed and its name did not appear on the ballot (A.114-123). The only incident of any kind that occurred at Kings Highway, was a single instance of an implied "threat"(as to being docked for 15 minutes lateness) in June, 1973. Whatever minor impact that isolated instance, from the prior case, may have been said to have at that spa, it was fully remedied by the 60-day posting of a notice (A.156). Nothing at all is alleged to have occurred with respect to Local 10 since that time, and Local 10 has been totally absent from the facts of this case. There is nothing to suggest that the Company will hereafter engage in unfair labor practices with respect to Local 10 or any other labor organization. N.L.R.B. v. Builders Supply Co. of Houston, 410 F. 2d 606, 611 (C.A.5, 1969).

2. The order, if one issues at all, should be limited to

restraining unfair labor practices like those, if any, ultimately found here. To restrain the Company from "in any other manner" discriminating or interfering with, restraining or coercing employees in the exercise of their statutory rights would place it in jeopardy of contempt for conduct completely separate and unrelated to that found here by the Board. Thus, for example, there is no evidence that the Company has, or would be likely to engage in, 8(2) or 8(5) conduct, or a myriad of other types of 8(1) and (3) conduct. But the Board's order encompasses such future conduct. Violations of some sections of the Act do not automatically warrant the restraint of all. N.L.R.B. v. Express Publishing Co., 312 U.S. 426, 61 S. Ct. 693, 85 L. Ed 930.

Although ALJ Stevenson, in the prior case (which arose out of this same organizational campaign, and may not therefore be properly regarded as a "history" of unfairs) found a few 8(1) violations, all in June, 1973, she dismissed the bulk of that case. Neither party filed exceptions. The Company did not, despite our belief that those findings were erroneous, only because the expenses of an appeal were felt to be unwarranted in proportion to the limited order. From July, 1973, through the election, there is little question that the Company abided by the exercise of employee statutory rights. There is no assertion that the Company engaged in conduct which interfered with a fair election. There was an election, which Local 966 lost, and to which no objections were filed (A.875). But a broad order would encompass

all kinds of pre-election conduct.

The violations found here are limited to post-election conduct by the Company towards a few individuals at one location. There was only a single instance of unlawful discharge (solely arguendo, of course) out of this union organizational campaign, and it came long after the election. It is therefore punitive to, in effect, equate the Company with a repeating, pervasive offender of the Act and apply to it a drastically broad order which would subject it to possible contempt for any type of future transgression of the Act. N.L.R.B. v. Builders Supply Co. of Houston, supra; N.L.R.B. v. J. W. Mays, Inc. 518 F.2d 1170 (C.A. 2, 1975); Cf., Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 61 S. Ct. 77, 85 L. Ed 6.

3. The order goes too far in applying to, and in requiring the posting of notices at, each of the Company's spas. (We note that, since the events here in question, the Company has increased the number of its spas from 10 to 15). The unfair labor practices alleged and found here are limited in all respects to the Douglaston spa. The Board's reference to its prior decision allegedly finding "other" unfair labor practices at "more than one spa" (A.58), as support for its order here, is an exaggeration of the single isolated instance of a "threat" at Kings Highway in June, 1973 - a threat already fully remedied by the posting of a notice. Moreover, the fact that the appropriate bargaining unit has been held to encompass all of the Company's spas does not

suffice to warrant posting at each such spa, or to warrant an order encompassing all the spas. United Mercantile, Inc., 204 NLRB No. 109 (posting at one of seven stores in the unit); Albert's Inc., 213 NLRB No. 94 (posting only at stores where violations occurred - violations far more extensive than those found here); Shell Oil Co. v. N.L.R.B., 196 F.2d 637 (C.A.5, 1952 - scope or order limited to one plant).

The Board's citation of J. P. Stevens and Co., Inc. v. N.L.R.B., 380 F.2d 292 (C.A.2, 1967) as support for its order in this case is wholly inapposite (page 31 of the Board's brief). The employer there, one of the most flagrant violators of the Act in the annals of Board litigation, had engaged in "massive" and "flagrant" violations, including 71 discharges, at some 20 of 43 plants. The stark contrast between that case and the instant one only serves to underscore the inappropriateness of the Board's order here.

CONCLUSION

Enforcement of the Board's order should be denied in all respects.

Dated: New York, New York
April 16, 1976

Respectfully submitted,

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ADDENDUM

A. Pertinent Sections of Title 29 U.S.C., Sections 151 et seq. (the National Labor Relations Act, as amended):

Title 29, U.S.C.

Sec. 152 - When used in this Act -

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Sec. 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * * .

Sec. 158

(a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees * * * .

* * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Sec. 160

* * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made ***. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. ***.

B. Pertinent Section of Title 5 U.S.C. Sections 500, et seq. (Administrative Procedure Act):

Title 5 U.S.C.

Sec. 556

* * *

(e) *** . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	
v.	DOCKET NO. 75-4205
JACK LA LANNE MANAGEMENT CORP., Respondent,	

CERTIFICATION OF SERVICE OF
RESPONDENT'S BRIEF

I hereby certify that two true copies of Respondent's brief herein were served, on this 16th day of April, 1976, by regular mail, upon:

Elliott Moore, Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Att: Eric Moskowitz, Esq.

Dated: New York, New York
April 16, 1976

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